

THE ENLISTMENT CONTRACT: A UNIFORM APPROACH*

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I. INTRODUCTION

I, _____, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.'

The enlistee completes the oath and a voice proudly announces: "You're in the Army now!" Despite the confidence with which this announcement is made, the United States Court of Military Appeals has, in a series of decisions,² cast doubt on the validity of hundreds of enlistments.³ Those opinions highlight the continuing legal problems surrounding enlistments. There is a wealth of law in the area, but little uniformity. There are many judicial and administrative opinions covering the topic, but little statutory guidance.

* This article is an adaptation of a thesis presented to The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia while the author was a member of the Twenty-fifth Judge Advocate Officer Advanced Class. The opinions and conclusions expressed in this article are those of the author and do not necessarily represent the views of The Judge Advocate General's School or any other governmental agency.

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¹ 10 U.S.C. § 502 (1970) (enlistment oath).

² See, e.g., *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975); *United States v. Brown*, 23 C.M.A. 162, 48 C.M.R. 778 (1974); *United States v. Catlow*, 23 C.M.A. 142, 48 C.M.R. 758 (1974).

³ The term "enlistment" is awkward. It has been used to describe the act of "enrolling" in the armed forces. See *United States v. King*, 11 C.M.A. 19, 28 C.M.R. 243 (1959). Periodically it is used to describe the completed act or the actual period of military service. *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480, 485 (1864). Research fails to find a decision which clearly differentiates between the two us-

The topic of enlistments arises with such regularity because the conceptual attributes of enlistment determine the substance of the soldier-state relationship. The nature, validity, and consequences of the enlistment contract touch almost every facet of military law, including such areas as court-martial jurisdiction, right to pay, discharges, and retirement benefits. Particularly troublesome is the fact that the rules which determine the validity of an enlistment contract in one area might be inapplicable in another area. This situation results from the fact that the federal district and circuit courts typically analyze the administrative and civil incidents of enlistment contracts while courts-martial and the Courts of Military Review and Appeals restrict their inquiry to relationship between the enlistment and military criminal jurisdiction over the enlistee. Perhaps because of this difference in focus, the inconsistencies between the federal district and circuit courts' perspective and the military courts' perspective of the enlistment are marked.

As the peace-time Army tests the feasibility of an all-volunteer force, the Court of Military Appeals has declared the enlistment to effect a change of "status" and to create a unique legal relationship. The mainstream of the American judicial system, however, has shown an increasing tendency to label all legal relationships as "contractual." For better or worse, the soldier-state relationship has not been immune from this tendency to characterize relationships as binding contracts, agreements, compacts, and covenants.

What has prompted the difference in perspective? There are no standard answers but three factors seem to lie at the root of the problem:

a. Lack of a concise and uniform definition of the term

ages. For purposes of this article, the term "enlistment" will be used to describe the act of becoming a soldier (servicemember, enlistee) in the armed forces.

The "enlistee" is a person who has entered the armed forces voluntarily, *see* 10 U.S.C. § 104(4) (1970), or a reserve unit, *see id.* § 261 (1970). He is to be distinguished from (1) inductees, who are inducted into the armed forces under the Selective Service laws. *Eman v. Clifford*, 287 F. Supp. 334, 338 (S.D. Cal. 1968); or (2) officers, who are appointed to office by the President. *Cf. Babbit v. United States*, 16 Ct. Cl. 202 (1880), *aff'd*, 104 U.S. 767 (1882), where the court distinguished West Point cadets from officers, noncommissioned officers and enlistees. The court also noted that "enlistment" is a technical word with a technical meaning, derived from British law. 16 Ct. Cl. at 213.

The term "enlistment" is often used in conjunction with the terms "enrollment" and "muster." Enrollment might be defined as joining the ranks and muster refers to the calling together of an armed force. Although both terms were used frequently in early opinions, they are no longer a part of the vocabulary used to assess the validity and effect of "enlistments."

“enlistment.” Does it create a contractual relationship or a status or both? Or neither?

- b. Diverse opinions as to what rules or bodies of law apply to the soldier-state relationship.
- c. The role of public policy in determining the validity of the enlistment agreement and the resulting status.

This article examines the diverse views, the resulting problems, and the feasibility of a uniform approach to enlistments. The inquiry begins with an historical analysis of the soldier-state relationship.

11. HISTORICAL ROOTS OF THE SOLDIER-STATE RELATIONSHIP

The concept of the soldier-state relationship has deep roots. It draws from centuries of tradition, and although the surface characteristics have changed through the years, the core of the relation has remained unchanged: The sovereign's power to raise armed forces is paramount and all citizens may be called upon to serve in those forces.

Feudal armies were raised by lords who pledged their allegiance to the monarch for a specified period in return for lands, honors, and reciprocal protection. Subjects of the lord owed allegiance only to him and performed military services for him. When their specified period of service was completed they returned to their farms and families.

The feudal army model remained until the advent of what we might call international wars. For example, in the Hundred Years War, Charles V of France hired a professional army of infantry, cavalry, and artillery. These bands of fighting men worked under a captain or colonel like workmen under a contractor. They served in return for wages, and when the money ran out, the soldiers left their posts.⁴

Direct sovereign control of national armies began with the reign of Louis XIV. He raised mass professional armies which were paid by him and owed allegiance directly to him. He supplied them with the king's uniform and demanded loyalty from both officers and private soldiers. The soldiers were recruited by enticing them with a bounty, and their service consisted largely of standing ready to fight for the king.⁵

The early British armies varied little from the French model. One

⁴ F. STERN, *THE CITIZEN ARMY* 55 (1957).

⁵ *Id.* at 56.

writer suggests that the roots of the American military tradition trace back to the Assize of Arms promulgated by King Henry II.⁶ The soldier's pay and allegiance were linked directly to the reigning monarch. During periods of national stability, recruiting practices and terms of service remained unchanged. However, during periods of unrest, the monarch was at liberty to impress vagrants into service and increase the punishments for misconduct.⁷

It was this system of direct allegiance that eventually found its way into the new world. Instead of relying heavily on the professional army, the early American colonies looked almost exclusively to the militia, farmers and townspeople ready to take up arms. However, the militia proved to be of limited value when their own homes were not being threatened and the fighting was taking place hundreds of miles away.⁸ The British responded to the inadequacies of the militia by shipping professional soldiers to the colonies and intensifying their recruiting techniques. Their techniques for obtaining adequate numbers of American recruits often included the use of fraud, trickery, and alcoholic spirits.⁹

During the American Revolution, the colonial plan of depending on the regular enlistees was barely adequate in light of the recruiting problems and the oft-cited shortages of supplies. George Washington's frustrations in maintaining an effective fighting force led him to propose the unpopular concept of compulsory service.¹⁰ Thus, by the time of the Revolution, American armed forces were

⁶ R. WEIGLEY, *HISTORY OF THE UNITED STATES ARMY* 3 (1967). See *Tyler v. Pomeroy*, 90 Mass. (8 Allen) 480 (1864), which contains a good review of the British treatment of enlistments.

⁷ Common soldiers were in fact the dregs of European society. vagabonds, ne'er-do-wells, and criminals. the only sorts of men who were willing to risk their lives for the little pay bestowed upon them. . . . Recruiting armies from the most shiftless and criminal of men necessitated in turn an extremely stiff discipline which in a vicious circle. made army life still more unattractive and required still more impressment of undesirables.

On the other hand, once a soldier was disciplined and trained in warfare, he represented a considerable financial investment, and therefore his government did not desire to see him killed. Accordingly, commanders planned campaigns and battles in such a way that the loss of life would be minimized.

R. WEIGLEY, *supra* note 6, at 18-19.

⁸ Colonel George Washington, after experiencing serious recruiting and discipline problems during the French and Indian War, wrote:

Militia, you will find, Sir, will never answer your expectations, no dependence is to be placed upon them: They are obstinate and perverse. they are often egged on by the Officers, who lead them to acts of disobedience, and when they are ordered to certain posts for the security of stores, or the protection of the Inhabitants, will, on a sudden, resolve to leave *them*, and thir United vigilance of their officers can not prevent them.

Id. at 16.

⁹ *Id.* at 18.

¹⁰ Voluntary enlistments seem to be entirely out of the question [he wrote as early as 1778], all the allurements of the most exorbitant bounties and every other inducement that could be

composed of a volunteer regular army augmented by conscripts and a strong militia.

With some minor adjustments, this formula of a standing army serving with a strong militia has prevailed. Likewise, the American army has been composed of those who have volunteered their services and those who, through legislative process, have been inducted into service. Even with the suspension of conscription there continues to be a class of soldier that enters the Army to avoid what may be perceived as a less desirable alternative. Despite the manner through which the soldier enters the armed forces, the soldier-state relationship is no longer indirect in nature (soldier-lord-king); but rather direct (soldier-state). Soldiers owe allegiance directly to the state.

As the relationship between the soldier and the state has changed, so has the judicial and administrative treatment of that relationship. As the relationship has gained sophistication, new legal questions concerning pay, recruiting practices, and terms of service have arisen. Defining the relationship and assessing the legal basis of the relationship have not been easy tasks. Courts and administrative systems have struggled with the issue and have in some cases reached directly opposite results.

A. *EARLY JUDICIAL VIEWS OF THE ENLISTMENT*

The early enlistment cases generally dealt with two recurring problem areas: the nature of the enlistment contract and the effect of statutory and regulatory controls on its execution. *United States v. Cottingham*¹¹ provides an interesting starting point in reviewing the early judicial view of the subject.

Cottingham had immigrated from Ireland and, after reenlisting in the Army, claimed to be an alien, not having taken any steps to become a naturalized citizen. The statute which set forth the qualifications for enlistment spoke in terms of enlistment of "citi-

thought of, have been tried in vain, and seem to have had little other effect than to increase the rapacity and raise the demands of those to whom they were held out. We may fairly infer, that the country has been already pretty well drained of that class of Men whose tempers, attachments and circumstances disposed them to enter permanently, or for a length of time, into the army. . . .

Id. at 41. The debate over use of compulsory service continues even after the arrival of the "all-volunteer" Army. *See, e.g.,* H. MARMION, *THE CASE AGAINST A VOLUNTEER ARMY* (1971); *WHY THE DRAFT?* (J. Miller ed. 1968). No doubt there is a fear that only the "dregs of society" will agree to serve. *See* note 7 *supra*.

¹¹ 40 Va. (1 Rob.) 615 (1843).

zens."¹² The Supreme Court of Virginia rejected the soldier's arguments that the statute prohibited enlistments of aliens and that any such enlistment would be unlawful and void; and that as a contract, the enlistment was void because it lacked the indispensable ingredient of mutuality. The court observed that the Government could either enforce the soldier's agreement (or contract) to serve or summarily release him from his obligation, with or without cause. The soldier held no such advantage. Despite this lack of mutuality, the enlistment could not be voided, because contracts of enlistment could not be treated as typical contracts.

The qualifications of age, height, and citizenship were, according to the court, intended for the protection of the Government.¹³ If the recruit were a minor, he was protected from youthful mistakes of judgment by the requirement that he obtain consent from an adult. The court assumed that an adult recruit would be aware of his disability, and, if he enlisted, he would be guilty of either fraud or collusion with the recruiter. Although either or both could be punished, it was the government's prerogative to either void or validate the enlistment.¹⁴

But what of the statutory language which required the recruit to be a citizen of the United States? The court stated that the Government could waive the disqualification:

There is no better rule of interpretation than this, that "no statute shall be construed in such manner as to be inconvenient or against reason." If a recruit were to claim exoneration from the service, on the ground that at the time of his enlistment he was under size, or under age, or infirm in body, would it not be a sufficient answer that the government, in its discretion, waived the objection, because he had since attained the requisite height or age, or had recovered, or would probably recover, from his disease; or because he possessed qualities which would more than compensate for his alleged deficiencies? And so if the plea be that of alienage, is it not enough to say that, though constrained to the admission that the native or naturalized citizen must be supposed to possess greater valour, higher intelligence and more approved fidelity than a mere stranger, yet there may be exceptions to the general rule; and that in the particular case

¹² Act of Mar. 16, 1802, ch. 9, 2 Stat. 132, "An Act fixing the military peace establishment of the United States."

¹³ 40 Va. (1 Rob.) at 667. The provisions of the 1802 Act had a fourfold purpose: (1) To keep up the peacetime establishment of the Army by volunteer enlistments; (2) to encourage recruiting by paying a premium to the recruiting officer and a bounty to the recruit; (3) to procure for the Government recruits best adapted to the service, and protect it against inadequate selections; and (4) to protect minors from their own improvident engagements.

¹⁴ 40 Va. (1 Rob.) at 667.

the petitioner is a gallant and disciplined soldier, whose oath of fidelity when he took the bounty, and his long residence and connections and interest in the country, furnish sufficient security for the faithful discharge of his duties?¹⁵

This construction of the statute was "in the true spirit of the law; while the opposite would open the door widely to the vilest frauds upon the public service."¹⁶ *Cottinghanz* did not stand alone; however, it provides a good summarization of the concepts employed by early American courts in dealing with enlistment problems.¹⁷

Equally troublesome to the courts was the problem of determining the validity of minority enlistments. The presence of minors in the armed services was commonplace, and to complicate matters, the age requirements fluctuated with the alternating states of war and peace. Three years after deciding that an alien could be enlisted, despite congressional language to the contrary, the Supreme Court of Virginia in *United States v. Blakeney*¹⁸ once again dealt with the enlistment. This time it turned its attention to the enlistment of a minor.

Blakeney, who was between the ages of nineteen and twenty years, had enlisted with a company of Virginia volunteers and was subsequently mustered into service with the United States when the war with Mexico began. The Act of March 1802,¹⁹ which had fixed the peacetime establishment of the United States Army, required enlistees between the ages of eighteen and twenty years to obtain the consent of their parents. No consent had been given in this case. At the time of the enlistment, however, Congress, by the Act of 1846,²⁰ had authorized the President to call up to 50,000 volunteers without stating any qualifications concerning the age of the troops. Blakeney was among those answering the call. The treatment of the problem by the majority and dissenting opinions reveals a great deal about the prevailing philosophies concerning the soldier-state relationship (specifically, the enlistment) in the first half of the nineteenth century.

¹⁵ *Id.* at 669-70.

¹⁶ *Id.* at 672.

¹⁷ See *United States v. Wyngall*, 5 Hill (N.Y.) 16 (1843), where the court was concerned with the effect of an alien's enlistment in the Army. The court considered the enlistment valid, holding the controlling statute to be only "directory," and finding no public policy against enlisting aliens. Historically, the practice had been common.

¹⁸ 44 Va. (3 Gratt.) 387 (1847).

¹⁹ Act of Mar. 16, 1802, ch. 9, 2 Stat. 132.

²⁰ Act of May 13, 1846, ch. 16, 9 Stat. 9, "An Act providing for the prosecution of the existing war between the U.S. and the Republic of Mexico."

The majority opinion reluctantly recognized the soldier-state relationship as contractual²¹ and stressed that the requirement of consent found in the Act of 1802 must be interpreted in light of a nation at war:

Every presumption was in favor of the ability to carry arms of volunteers thus brought forth and embodied; and nothing more was contemplated. If such ability in reference to this statute was still to be a subject for judicial decision, instead of official discretion, then it must be determined, not by the special circumstances of each particular case, but by a general rule of uniform application. We know, as a matter of fact, that at the age of eighteen, a man is capable intellectually and physically of bearing arms; and that it is the military age recognized by the whole legislation of Congress, and of the State of Virginia, and of all the States of the Union, perhaps without exception. There was no temptation and scarcely any room for abuses in the execution of the law; and cases of fraud, and want of consent from mental aberration or debility, are exceptions from every rule, and applicable to every age.²²

The court further adopted the philosophy that the contract of a minor to serve the State was binding "whenever such an agreement is not positively forbidden by the State."²³

The dissenting opinion maintained that the public law should not be construed so broadly as to grant the right to contract to anyone capable of bearing arms:

The relation between parent and child, is, of all others, the most important. . . . The whole superstructure of civil society rests upon it. But until there is an express declaration of an intention to change the rule in reference to military contracts, they must be controlled and regulated by the principles applicable to other contracts. We must look to the common law as existing amongst ourselves, modified and adapted to our peculiar institutions, to ascertain whether the party entering into a contract of this kind, possesses the legal capacity to bind himself by such an engagement.²⁴

²¹ The court hesitated to label the enlistment as a contract "unless we suffer it to mislead us as to the true character of the thing." 44 Va. (3 Gratt.) at 391.

²² *Id.* at 399.

²³ *Id.* at 405. The majority opinion, citing Judge Story's opinion in *United States v. Bainbridge*, 24 F. Cas. 946 (C.C.D. Mass. 1816) (No. 14,497), stated that "Under the Acts of Congress for the employment of men and boys in the navy, the contracts of enlistment of the latter are obligatory upon them, though made without the consent of parent, master or guardian." Judge Story stated, "[T]he disabilities of an infant are intended by law for his own benefit, and not for the protection of the rights of third persons. . . ." 24 F. Cas. at 950. That minority position was later modified when it was recognized that the statutes could be for the protection of the parent or guardian. *See, e.g., United States v. Reaves*, 126 F. 127 (5th Cir. 1903). Note that the minimum age of enlistment in the Navy was at one time as low as thirteen years of age. *See Ex parte Brown*, 4 F. Cas. 325, 326 n.2 (C.C.D.C. 1839) (No. 1,972).

²⁴ 44 Va. (3 Gratt.) at 409 (Allen, J. dissenting).

The dissent's rationale for considering the minority enlistment invalid was this: In the absence of congressional action, the courts should look to the state or municipal law of the location of the formation of the enlistment contract. Because the Act of 1846 calling for the volunteers was silent as to the capacity to contract, and because the Commonwealth of Virginia had not acted specifically on the capacity of minors to enlist, the Act of 1802 controlled. Therefore, parental consent should have been obtained.²⁵

The majority and dissenting opinions in *Blakeney* reflect the conflicting views of the two schools of thought concerning the nature of the enlistment agreement. The one school proposed that the enlistment was a contract but that in times of national need, the capacity to enter the contract should be liberally expanded whether specifically so stated by Congress or not. Stated another way: "A man old enough to die for his country is old enough to serve it."²⁶ The opposite view was that unless Congress had specifically acted in this area, the municipal law of contracts applied. The capacity to contract should not be loosely interpreted.

A review of the early judicial posture toward the enlistment reveals the beginning of two common threads. First, the power of the sovereign to raise and support armies is paramount. The nature of the relationship and the procedures for entering into it may change, but the power to either ask for or demand the service of the citizenry is ever present. Second, the courts have traditionally treated the enlistment as a contract, the terms of which are to be examined in the light of the sovereign's ability to raise an army and determine the criteria for service in that army. Public law must be considered in interpreting the criteria. These common threads have taken some interesting and sometimes bewildering turns. In doing so, they have provided the base for the numerous and diverse cases to follow.

111. THE SUPREME COURT AND ENLISTMENTS

In the last half of the 1800's the federal judiciary began dealing

²⁵ *Id.* at 420.

²⁶ *Id.* at 406. In a concurring opinion, Justice Brooke rejected the application of the common law of contracts to the case, and noted that the minor owed higher obligations to his country. Continuing that theme and reminiscing that the military age in the "Revolution" was sixteen, Brooke added: "[C]ommissions were given to many who were not twenty-one years of age. I myself received a commission as first lieutenant in Col. Harrison's regiment of artillery before I was seventeen years of age, whilst I was at school; and served three years, to the end of the war." *Id.* at 421-22.

more and more with enlistments and related issues such as defining the nature of the enlistment and effect, if any, of the enlistment oath. The opposing views of the majority and dissenting judges in *Uizited States v. Blakeney* noted in the preceding section were typically reflected in later federal opinions. In 1890, the United States Supreme Court addressed the issue.

A. *UNITED STATES v. GRIMLEY* ²⁷

On February 18, 1888, John Grimley, age forty years, appeared at a recruiting rendezvous in Boston, represented himself to be twenty-eight years old, and indicated an interest in joining the Army. He took a physical examination, signed the requisite oath and received an issue of clothing. He went home, stayed there, and was later convicted of desertion. While confined, Grimley sought a writ of habeas corpus in a Massachusetts district court, alleging that his enlistment was void, and that the court-martial had been without jurisdiction to try him. The basis for this contention was that the enlistment statute required recruits to be "between the ages of sixteen and thirty-five years, at the time of their enlistment."²⁸ Both the district and circuit courts agreed with Grimley and held that he was not amenable to court-martial jurisdiction because his enlistment was void.

Before the Supreme Court, both parties relied on the numerous enlistment cases rendered by both state and federal courts.²⁹ The thrust of the government's argument was that the enlistment agreement was completed at the taking of the oath, and because the statutory restrictions were for the benefit of the Government, the contract was voidable only by the Government. The lawyers for Grimley relied on a line of cases which had ruled that enlistments of minors were void because the statutory language was clearly prohibitive.³⁰ In addition, they argued that the proceedings at the

²⁷ 137 U.S. 147 (1890).

²⁸ Section 116 of the Revised Statutes provided: "Recruits enlisting in the army must be effective and able-bodied men, and between the ages of sixteen and thirty-five years, at the time of their enlistment."

²⁹ The wealth of cases cited by both sides is set forth in the reporter's preface to the opinion. At least one writer feels that the Court completely ignored the briefs of the parties and rendered an "absurd" opinion. Carpenter, Enlistment—A Contract, Status, or Marriage? (March 1973) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

³⁰ Grimley's lawyers cited *United States v. Cottingham* in support of their argument that the congressional intent was clear. The recital of "citizen of the United States" had been subsequently dropped, but the age limitation had been retained. Thus, they argued, the mandatory character of the age requirement was emphasized. 137 U.S. at 147.

rendezvous did not constitute a valid enlistment.

The Court rejected Grimley's arguments and held that an enlistment had taken place and that the enlistment was voidable only at the instance of the Government for whose benefit the statute had been drafted. Because there was no inherent vice in a forty-year old recruit serving his country, the Court felt that public policy would not justify setting the enlistment aside. Dealing with the jurisdictional question, the Court in *Grimley* utilized language which characterized the enlistment as a matter of contractual relation.³¹ However, the Court continued:

But in this transaction something more is involved than the making of a contract, whose breach exposes to an action for damages. Enlistment is a contract; but it is one of those contracts which changes the status; and where that is changed, no breach of the contract destroys the new status or relieves from the obligations which its existence imposes. Marriage is a contract; but it is one which creates a status. Its contract obligations are mutual faithfulness; but a breach of those obligations does not destroy the status or change the relation of the parties to each other. The parties remain husband and wife, no matter what their conduct to each other—no matter how great their disregard of marital obligations. It is true that courts have power, under the statutes of most States, to terminate those contract obligations and put an end to the marital relations. But this is never done at the instance of the wrong-doer. The injured party, and the injured party alone, can obtain relief and a change of status by judicial action. So also, a foreigner by naturalization enters into new obligations. More than that, he thereby changes his status; he ceases to be an alien, and becomes a citizen, and when that change is once accomplished, no disloyalty on his part, no breach of the obligations of citizenship, of itself destroys his citizenship. In other words, it is a general rule accompanying a change of status, that when once accomplished it is not destroyed by the mere misconduct of one of the parties, and the guilty party cannot plead his own wrong as working a termination and destruction thereof.³²

Although this language is found in many subsequent cases dealing with enlistments, an often overlooked portion of the opinion dealt with the issue of the public good. There were repeated references to

³¹ 137 U.S. at 150. The Supreme Court had referred to the enlistment as a contract on at least one prior occasion. In assessing a soldier's right to pay in *United States v. Landers*, 92 U.S. 77 (1876), the Court noted that the contract of enlistment called for faithful service. "The contract is an entirety; and if service for any portion of the time is criminally omitted, the pay and allowances for faithful service are not earned." 92 U.S. at 79. Compare *id.* with *Bell v. United States*, 366 U.S. 393 (1961) (right to accrued pay based upon statute not contract rights) and *Word v. United States*, 158 F.2d 499 (8th Cir. 1947).

³² 137 U.S. at 131.

Grimley's misrepresentation and the government's reliance on that falsehood.

Implicit in the decision is the common thread revealed earlier in *United States v. Cottingham* and *United States v. Blakeney*. Because the Government possesses the ultimate power to require the service of *all* persons, the statutes regulating the qualifications of the recruits are for the convenience of the Government:

Now, there is no inherent vice in the military service of a man forty years of age. The age of thirty-five, as prescribed in the Statute, is one of convenience merely. The government has the right to the military service of all its able-bodied citizens, and may, when emergency arises, justly exact that service from all. And if for its own convenience, and with a view to the selection of the best material, it has fixed the age at thirty-five, it is a matter which in any given case it may waive; and it does not lie in the mouth of anyone above that age, on that account alone, to demand release from an obligation voluntarily assumed, and discharge from a service voluntarily entered into. The government, and the government alone, is the party to the transaction that can raise objections on that ground. We conclude, therefore, that the age of the petitioner was no ground for his discharge.³³

B. *MORRISSEY v. PERRY* ³⁴

The same day *Grimley* was decided, Justice Brewer, again writing for the Supreme Court, dealt with the problem of minority enlistments. In *Morrissey*, a seventeen-year-old enlisted in the Army without his mother's consent. At the time of his enlistment the statutory minimum age was sixteen, and because he was under twenty-one years of age parental consent was required. When he enlisted he swore that he was twenty-one years and five months old. He received his clothing issue and served for approximately three weeks before deserting. After an absence of five and one-half years he reappeared and demanded his discharge on the ground that he had enlisted as a minor.

The Court ruled that Morrissey was not only a *de facto* soldier but a *de jure* soldier as well. Congress, the Court went on to say, can set the age at which an "infant" can be competent to perform either military or civil acts; the requirement of consent was for the benefit of the parents alone.³⁵ Citing its opinion in *Grimley*, the Court stated that an enlistment was not only a contract but also a

³³ *Id.* at 153.

³⁴ 137 U.S. 157 (1890).

³⁵ *Id.* at 159. At common law an enlistment was not voidable by either the minor or his parents. See *United States v. Blakeney*, 44 Va. (3 Gratt.) at 405.

change of status. Therefore, it was not voidable by a minor as if it were an ordinary contract.³⁶

What is the significance of these two cases? In arguing their respective positions, both sides presented to the Supreme Court a comprehensive list of existing authorities on the subject of enlistments. It follows that *Grimley* and *Morrissey* serve as both the capstone of the law of enlistments before 1890 and as the cornerstone for the body of law which followed.

IV. FEDERAL DISTRICT AND CIRCUIT COURTS' CONSIDERATION OF ENLISTMENTS

Following the rationale in the Supreme Court's opinions, the lower federal courts³⁷ have generally applied contract law principles when deciding enlistment questions. Where the validity of the enlistment contract is in question, the cases before the federal courts fall into three categories:³⁸

- a. Those cases where the servicemember has enlisted in violation of one or more statutory provisions.
- b. Those cases where the servicemember's enlistment is violative of a service regulation.
- c. Those cases where, during the course of the enlistment, an alleged breach (by either party) has occurred.

The soldier may be raising the invalidity of his enlistment contract to avoid the jurisdiction of a court-martial,³⁹ or he may simply be

³⁶ The effect of *Morrissey* was reviewed in *United States v. Reaves*, 126 F. 127 (5th Cir. 1903). The court provided a synopsis of the minority enlistment problems and rejected the argument that because public policy favors parental control, the enlistment entered without the required parental consent should be considered null and void. That position, the court stated, had been adopted in *In re Chapman*, 37 F. 327 (N.D. Ga. 1889), but had been overruled by the Supreme Court in *Morrissey* and *Grimley*. The lower court opinion in *Reaves*, at 121 F. 848 (M.D. Ala. 1903), presents a thorough discussion of the "void *ab initio*" argument for minority enlistments entered into without parental consent.

³⁷ In this article the term "federal courts" refers to those courts established under Article III of the United States Constitution.

³⁸ Each category could in turn be broken down into those cases which deal with the "criminal" aspects of the enlistment (validity of the enlistment contract for purposes of court-martial jurisdiction) and those which concentrate on the civil aspects (formation and performance questions). For the most part, the contemporary federal courts are dealing only with the civil aspects. This is due in large part to requirement that an individual subjected to trial by court-martial first exhaust questions of jurisdiction within the military system. *See, e.g.*, *Schlesinger v. Councilman*, 420 U.S. 738 (1975); *Hodges v. Callaway*, 499 F.2d 417 (5th Cir. 1974); *Mindes v. Seaman*, 453 F.2d 197 (5th Cir. 1971).

³⁹ The servicemember may challenge his military "status" even though no court-

attempting to avoid further service under the agreement. The ultimate question, though, centers on the nature and validity of the relationship between the United States government and the soldier.⁴⁰

A. EFFECT OF STATUTORY CONTROLS

With some exceptions, the statutory qualifications for entering the armed forces have changed little. In establishing criteria for service, the Congress has determined who may enter into a contractual relationship with the Government.⁴¹ What if an enlistment contract is formed in contravention of a statute which restricts the capacity of one of the parties to enter into the contract? The outcome depends upon what is being restricted and for whose benefit the restriction has been drafted.

The statutory restriction most frequently considered deals with minority enlistments.⁴² Almost all federal authorities now agree that if a minor enlists under the minimum statutory age the contract is void.⁴³ Although the military courts have decided the issue,⁴⁴ the federal judiciary has not specifically determined whether such a contract ever becomes a voidable or a valid enlistment after the minor reaches the minimum age. Likewise, the federal courts have not decided whether a minor under the minimum statutory age who commits a crime is nonetheless amenable to court-martial jurisdiction. Early federal decisions indicate that even statutory defects (such as enlistment without the required parental consent)⁴⁵ which

martial is pending. *See* *Billings v. Truesdale*, 321 U.S. 542 (1944). Often relief is sought through a petition for habeas corpus because military status has been equated to "custody" for that purpose. *See* *Jones v. Cunningham*, 371 U.S. 236 (1962); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968). For a recent discussion of habeas corpus review, *see* *McFeeley, Habeas Corpus and Due Process From Warren to Burger*, 28 *BAYLOR L. REV.* 533 (1976).

⁴⁰ In a number of cases the alleged irregularities involve both statutory and regulatory provisions. For instance, in *Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921), the servicemember was an alien minor (age sixteen) and in *Ex parte Dostal*, 243 F. 664 (N.D. Ohio 1917), the servicemember alleged a fraudulent enlistment because he was an alien minor who had failed to indicate that he had a dependent mother. Both enlistments were found to be valid.

⁴¹ *See* *Morrissey v. Perry*, 137 U.S. 157 (1890); *United States v. Blakeney*, 44 Va. (3 Gratt.) 387, 396 (1847) (Allen, J. dissenting). *See also* *In re Davison*, 21 F. 618 (S.D.N.Y. 1884).

⁴² 10 U.S.C. § 505(a) (Supp. V 1975).

⁴³ *Morrissey v. Perry*, 137 U.S. 157 (1890); *United States ex rei. Laikund v. Wiliford*, 220 F. 291 (2d Cir. 1915); *cf. Ex parte Beaver*, 271 F. 493 (N.D. Ohio 1921).

⁴⁴ *United States v. Brown*, 22 C.M.A. 162, 48 C.M.R. 778 (1974).

⁴⁵ *Dillingham v. Booker*, 163 F. 696 (4th Cir. 1908); *United States v. Reaves*, 126 F. 127 (5th Cir. 1903); *In re Miller*, 114 F. 838 (5th Cir. 1902).

render an enlistment illegal are moot after the soldier has committed a crime. Whether contemporary federal courts will maintain that position is questionable.

The *Grimley* rationale was reiterated in a series of cases arising when soldiers claimed that their enlistments, entered into while they were pending induction, were void. The controlling statute,⁴⁶ the courts declared, was intended for the benefit of the Government (the Selective Service boards) and not for the potential inductee.⁴⁷ Statutory restrictions⁴⁸ concerning alienage,⁴⁹ mental competency⁵⁰ and criminal records should also be considered for the benefit of the Government absent some showing that there is some inherent evil in the contractual relationship.

Therefore, statutory violations in forming the enlistment contract do not always render the contract void—at least in the eyes of the federal courts.⁵¹ In most cases they are voidable at the instance of

⁴⁶ 50 U.S.C. app. § 465(d) (1970), which states: “[N]o person shall be accepted for enlistment after he has received orders to report for induction.”

⁴⁷ *Tuxworth v. Froehke*, 449 F.2d 763 (1st Cir. 1971); *Stokum v. Warner*, 360 F. Supp. 261 (C.D. Cal. 1973). *But see* *Moore v. Dalssio*, 332 F. Supp. 926 (D. Mass. 1971). *See also* *Whitmore v. Tarr*, 331 F. Supp. 1369 (D. Neb. 1971).

⁴⁸ No person who is insane, intoxicated, or a deserter from an armed force, or who has been convicted of a felony, may be enlisted in any armed force. However, the Secretary concerned may authorize exceptions, in meritorious cases for the enlistment of deserters and persons convicted of felonies.

10 U.S.C. § 504 (1970).

⁴⁹ *See Ex parte* *Beaver*, 271 F. 493 (N.D. Ohio 1921); *Ex parte* *Dostal*, 243 F. 664 (N.D. Ohio 1917); *United States v. Wyngall*, 44 Va. (3 Gratt.) 387 (1847); *United States v. Cottingham*, 40 Va. (1 Rob.) 615 (1843). Congress has authorized the enlistment of aliens as a means of securing needed linguists, skilled military specialists and technicians. *See* DAJA-AL 197214744, 31 Aug. 1972 (discussion of Lodge Act, Act of June 30, 1950, Pub. L. No. 81-597, 64 Stat. 316 (expired June 30, 1959)). The requirement of citizenship is covered in 10 U.S.C. § 3253 (1970):

Army: persons not qualified.

In time of peace, no person may be accepted for original enlistment in the Army unless he is a citizen of the United States or has been lawfully admitted to the United States for permanent residence under the applicable provisions of chapter 12 of title 8.

⁵⁰ *See In re* *Judge's Petition*, 148 F. Supp. 80 (S.D. Cal. 1956) (servicemember must show that he was insane on date of enlistment). Enlistment of “insane” persons is prohibited by 10 U.S.C. § 504 (1970). The Comptroller General has held that there is no substantial basis for regarding a servicemember as an insane person unless he has been the subject of a prior judicial determination of mental incompetence. *See* 39 Comp. Gen. 742, 747 (1960).

⁵¹ Courts have also dispensed with statutory formalities where equity demands such. In *Coe v. United States*, 44 Ct. Cl. 419 (1909), the claimant had missed the deadline for receiving his statutory reenlistment bonus because of a heavy recruiting schedule. The court ruled in his favor because he had filled out the necessary paperwork before the time limit had expired. In *In re* *Agustin*, 62 F. Supp. 832 (N.D. Cal. 1945), a Filipino national (who had served the United States as a guer-

the Government; in some minority cases they are voidable at the instance of the minor's parents or guardian.⁵²

B. EFFECT OF REGULATORY CONTROLS

If a soldier cannot convince a federal court that his enlistment contract is invalid on statutory grounds, he can advance the argument that in the process of entering into the contract a military regulation was violated. Despite the oft-cited rule that the Government is required to follow its own regulations,⁵³ not every regulatory violation will entitle the soldier to the relief he requests. If the servicemember has suffered no prejudice,⁵⁴ if the regulation is not for his benefit,⁵⁵ or if it appears that he has acted in bad faith,⁵⁶ the federal courts generally will rule that a violation of the regulation does not entitle him to relief.

An example of the courts' interpretation of regulatory controls is found in *Johnson v. Chafee*.⁵⁷ Johnson (already on active duty) had

rilla fighter in World War II) was granted citizenship although the "formal" enlistment or induction into the United States armed forces was lacking. Federal courts have also held that "the equivalent of an enlistment" may be found where the servicemember has continually served after the removal of the disqualification. See *Barret v. Looney*, 158 F. Supp. 224 (D. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir.), *cert. denied*, 357 U.S. 940 (1958); *Ex parte Hubbard*, 182 F. 76, 81 (D. Mass. 1910).

The Comptroller General has also found "constructive enlistments." See 45 Comp. Gen. 218 (1965); 40 Comp. Gen. 428 (1961) ("ratification" of a void formal enlistment); 39 Comp. Gen. 860, 863 (1960) ("equivalent" enlistment after removal of disqualification).

⁵² Regular enlisted members: minority discharge.

Upon application by the parents or guardian of a regular enlisted member of an armed force to the Secretary concerned within 90 days after the member's enlistment, the member shall be discharged for his own convenience, with the pay and form of discharge certificate to which his service entitles him, if—

(1) there is evidence satisfactory to the Secretary concerned that the member is under eighteen years of age; and

(2) the member enlisted without the written consent of his parent or guardian.

10 U.S.C. § 1170 (1970). The Army's procedure for discharging minors is found in Army Reg. No. 635-200, Personnel Separations—Enlisted Personnel, ch. 7 (C 33, 8 Feb. 1972) [hereinafter cited as AR 635-200].

⁵³ See, e.g., *Vitarelli v. Seaton*, 359 U.S. 535 (1959); *Harmon v. Brucker*, 355 U.S. 579 (1958); *Service v. Dulles*, 354 U.S. 363 (1957). See also Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 *MIL. L. REV.* 1, 33-37 (1975).

⁵⁴ *United States ex rel. Stone v. Robinson*, 431 F.2d 548 (3d Cir. 1970).

⁵⁵ See, e.g., *Allgood v. Kenan*, 470 F.2d 617 (9th Cir. 1972) (regulation for benefit of Government); *Silverthorne v. Laird*, 460 F.2d 1175 (5th Cir. 1972) (conscientious objector regulation for servicemember's benefit).

⁵⁶ *Wier v. United States*, 474 F.2d 617 (Ct. Cl. 1973).

⁵⁷ 469 F.2d 1216 (9th Cir. 1972); *accord*, *Kubitschek v. Chafee*, 469 F.2d 1221 (9th Cir. 1972). But see *Savage v. Middendorf*, 4 Mil. L. Rep. 2380 (Civ. No. 75-1114-

signed a two-year extension agreement with the Navy whereby he would receive special training in a nuclear program. Contrary to naval requirements, Johnson's agreement was sworn to before a warrant officer.⁵⁸ Rejecting the argument, and the lower court's holding, that execution of the agreement had to comport with the regulations, the court found that a "formal defect" should not defeat an otherwise valid agreement.⁵⁹ The court continued:

Far from being prejudiced from the fact that a noncommissioned officer accepted the contract terms on behalf of the Navy, Johnson was the recipient of considerable benefits under the agreement: thirty-three weeks of special training which he would not otherwise have received. On its part, the Navy, by enrolling Johnson in the Nuclear Field Program, manifested its intent to be bound by the extension agreement, regardless of any flaw existing in the execution of the contract. Thus, even assuming for the moment that the notarial defect prevented the parties from being legally bound at the time of signing, their subsequent acts constituted a dual ratification of the contract terms.⁶⁰

A certainly different result is found in cases where the soldier has

S, S.D.Cal. May 20, 1976), where the district court granted a writ of habeas corpus to Navy servicemember who had voluntarily enlisted in the Navy in return for dismissal of pending civilian criminal charges. Navy recruiting regulations prohibited such procedures. The court frowned upon the petitioner's "manipulative behavior" (using the Navy to solve his legal problems, then using the legal system to solve his Navy problem), but focused on the conduct of the recruiter and his superiors. Citing *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975), *see* notes 120 to 126 and accompanying text *infra*, the court voided the enlistment.

⁵⁸ The pertinent provision of the Naval Manual provided:

General. In order to be considered legal and binding, pertinent portions of the Agreement to Extend Enlistment must be filled in as shown in Exhibit 1A-1 of Article B-2311 and signed by both the individual and the commissioned officer administering the oath on or prior to expiration of enlistment. . . . *Agreements entered into subsequent to the date of expiration of enlistment are without legal force and effect.*

469 F.2d at 1218 n.3.

⁵⁹ The court cited *United States ex rel. Stone v. Robinson*, 431 F.2d at 553:

Certainly, any routine failure of appellant to swear to his execution of his extension form would not affect the validity of the enlistment extension, just as the violation of every regulation in some particular does not always invalidate the action taken thereunder. If the Regulation in this instance was not complied with in the respect indicated, appellant was not prejudiced in any way.

469 F.2d at 1219.

⁶⁰ *Id.* The court also noted that even if Johnson had neglected to take the oath, his signature would have sufficed to bind him. *See Nixon v. Secretary of the Navy*, 422 F.2d 934, 938-40 (2d Cir. 1970); *United States ex rel. Stone v. Robinson*, 431 F.2d 548, 552 (1970). Such language indicates a departure from the pivotal importance of the "oath" noted in *Grimley*.

been inducted⁶¹ or involuntarily activated.⁶² The important element of "voluntariness" has been found lacking⁶³ and in those cases a formal defect has invalidated the government's attempt to enforce the induction statute or the reserve agreement.

C. BREACH OF CONTRACT

Perhaps the strongest indication of the federal courts' perspective of the enlistment is found in those enlistment cases where an alleged breach has occurred. Despite an earlier reluctance to review government activities in general, the federal courts do consider the merits of the servicemember's arguments and show a disposition to void enlistments where a material breach is proved.⁶⁴ The breach of contract argument can arise in various ways. It has, for instance, been raised by reservists who have been involuntarily activated, whether as a result of presidential direction or because of repeated acts of misconduct while in reserve status.⁶⁵ Relief is usually sought on the argument that the Government has illegally modified the contract.

An example of involuntary activation can be found in *Pfile v. Corcoran*.⁶⁶ The enlistment contract provided that the enlistee could be ordered to active duty for training for a maximum period of forty-five days if at any time he failed to perform satisfactorily. After the contract was entered, Congress increased the period of required active duty to twenty-four months.⁶⁷ Pfile subsequently missed the required summer camp and was ordered to active duty for two years. His argument, that Congress could not change the terms of his original enlistment contract, was rejected. A contract of this type, the court noted, "always stands in the shadow of the

⁶¹ *Billings v. Truesdale*, 321 U.S. 542 (1944); *United States v. Mellis*, 59 F. Supp. 682 (M.D.N.C. 1945) (distinguishing *Billings*). See also *Mayborn v. Heflebower*, 145 F.2d 864 (5th Cir. 1944).

⁶² *Konn v. Laird*, 460 F.2d 1318 (7th Cir. 1972) (unexcused absences which prompted activation were improperly assessed against reservist). However, failure of the service to follow its own regulations was not fatal in *White v. Callaway*, 501 F.2d 672 (5th Cir. 1974), or in *Alston v. Schlesinger*, 368 F. Supp. 537 (D. Mass. 1974). A discussion of involuntary activation is found in Dilloff, *Involuntary Activation of Reservists*, 63 Ky. L.J. 895 (1975).

⁶³ The voluntary entry sets enlistments apart from inductions. *Brown v. McNamara*, 387 F.2d 150, 152 (3d Cir. 1967).

⁶⁴ But see *United States ex rel. Lewis v. Laird*, 337 F. Supp. 118, 120 (S.D. Ill. 1972), where the court doubted that extraordinary relief would be available to obtain review of an alleged breach of the enlistment contract by the Government.

⁶⁵ See note 62 and accompanying text *supra*.

⁶⁶ 287 F. Supp. 554 (D. Colo. 1968).

⁶⁷ Act of June 30, 1967, Pub. L. No. 90-40, § 6(1), 81 Stat. 105.

exercise by Congress of positive paramount sovereign powers.”⁶⁸ The “sovereign powers” in this case were the congressional war powers.⁶⁹

The breach of contract argument is usually raised where the servicemember alleges that his enlistment options were not fulfilled. Illustrative of the trend of the federal courts in this area is *Bemis v. Whalen*.⁷⁰ The petitioner, Bemis, sought a discharge from the Marine Corps on the grounds of false representations and breach of contract. He had enlisted after being guaranteed a military occupational specialty (MOS) in electronics. He was, in the words of the court, also desirous of completing his military obligation and being able to take advantage of educational benefits under the G.I. Bill. The military made a mistake and Bemis was extensively trained in a different MOS as a telephone/teletype technician. The error was discovered and Bemis was assigned to a school for training in the original specialty. Seeking relief, he nonetheless took his cause to federal court and sought his discharge.

The court, relying on *Grimley*, defined an enlistment as a “contract between the United States and the enlistee [that] in the absence of supervening statute, is governed by general principles of contract law [and] a party induced by fraud or mistake to enter into a contract may rescind that contract. . . .”⁷¹ Using repeated contractual references such as “contractual obligations” and “benefit of bargain,” the court ruled that Bemis was in fact receiving what he had bargained for. Because time was not of the essence in receiving the guaranteed training, there was no material breach of contract.⁷²

⁶⁸ 287 F. Supp. at 561.

⁶⁹ See U.S. CONST. art. I, § 8, cl. 11 (power to declare war); *id.* cl. 12 (power to raise and support armies); *id.* cl. 14 (power to make rules for the government and regulation of the land and naval forces). See *niso* Antonuk v. United States, 445 F.2d 592 (6th Cir. 1971), where the court, in declaring that a reservist could be activated notwithstanding clauses in his enlistment contract to the contrary, stated:

Here, the possible detriment to the individual is great. If the activation order is upheld, his liberty will be significantly limited by military discipline. and there is a significant risk that he might be wounded in battle or even killed. But at the same time. the governmental interest in raising an army has, without exception, been considered by the courts to be paramount. Thus the ordinary balancing tests are rendered almost irrelevant by the transcendent importance of the war power.

Id. at 594 (citations omitted).

⁷⁰ 341 F. Supp. 1289 (S.D. Cal. 1972).

⁷¹ *Id.* at 1291.

⁷² The “material breach” requirement was also relied upon in rejecting a serviceman’s request for rescission of his enlistment contract in *Crane v. Coleman*, 389 F. Supp. 22 (E.D. Pa. 1975). In that case the servicemember claimed that he had not received allotments as promised. The court reasoned that the breach was not

A material breach of contract was found in *Novak v. Rumsfeld*.⁷³ Novak enlisted in the Navy in December 1974 for a period of four years and shortly thereafter executed a two-year extension contract for the purpose of attaining eligibility for the Nuclear Field Training Program. During a preparatory six-week refresher course, he experienced "scholastic difficulties" and was dismissed from the program. When he was subsequently assigned to a clerical position he requested a discharge from the Navy. His request was denied.

In granting the servicemember's petition for a writ of habeas corpus, the court noted that Novak had entered into both the original enlistment contract and the extension agreement because of the opportunity for advanced training.⁷⁴ By not providing the promised training, the Navy, according to the court, had materially breached not only the extension agreement but also the original enlistment agreement.⁷⁵ The court further noted that the Navy had not

so material and substantial in nature that it affected the essence of the contract and defeated the object of the parties. In *Hayes v. Secretary of Defense*, 515 F.2d 668 (D.C. Cir. 1975), the court rejected a breach of contract argument. The servicemember had not received a promised military intelligence assignment. The court examined the enlistment contract and determined that the Government had properly reassigned him. He had not "qualified" for the position—a condition precedent specifically provided for in the contract. And in *United States ex rel. Roman v. Schlesinger*, 404 F. Supp. 77 (E.D.N.Y. 1975), the servicemember was deemed to have waived the equitable relief of rescission because he had waited almost a year after discovering that he was not going to receive the schooling indicated in his enlistment contract. The servicemember in *Matzelle v. Pratt*, 332 F. Supp. 1010 (E.D. Va. 1971) was also denied relief. Government delay (several days) in paying a lump sum bonus was not a material breach. The court noted that the servicemember was more interested in rescinding his enlistment contract than in receiving the money. The case contains a good discussion of the remedy of rescission.

⁷³ 423 F. Supp. 971 (N.D. Cal. 1976).

⁷⁴ There is no indication whether Novak's motives for originally enlisting were ever incorporated into the enlistment contract or its annexes. Normally, the servicemember is bound by the "Statements of Understanding" absent a showing of fraud. *Chalfant v. Laird*, 420 F.2d 945 (9th Cir. 1969). Oral promises are not binding on the Government. *Jackson v. United States*, 551 F.2d 282 (Ct. Cl. 1975). Nonetheless the court seemed content in setting aside the original contract on the basis of the servicemember's allegations concerning his motives for executing it.

⁷⁵ Navy regulations provided that extension agreements could be set aside if promised benefits were not provided. But no provisions were cited which allowed the servicemember to avoid the original enlistment contract. The court distinguished *Nixon v. Secretary of Navy*, 422 F.2d 934 (2d Cir. 1960), where the servicemember had received substantially all of his promised benefits before seeking rescission. The court made no mention of its earlier decision in *Quinn v. Schlesinger*, 4 Mil. L. Rep. 2383 (So. C-75-1670 WHO, N.D. Cal. Dec. 22, 1975) (oral opinion). In *Quinn* the naval servicemember had enlisted for service on the West Coast. When he was assigned to Okinawa, he sought and was denied a discharge. After he instituted judicial proceedings, he was assigned to San Diego. The court, in granting the petition for a writ of habeas corpus, distinguished

adequately informed Novak of the rigorous program requirements. No mention was made of any possible justification for the "breach" by the Government.⁷⁶

Relief under contract principles was also granted to the servicemember in *Larionoff v. United States*.⁷⁷ In *Larionoff* the petitioner enlisted in June 1969 for a period of four years. In July 1969 he executed an agreement to extend his period of service by two years for the purpose of serving in a critical military skill and in consideration of the "pay, allowances, and benefits which will accrue . . . during the continuance of [his] service."⁷⁸

When Larionoff signed the extension agreement the Government was offering variable reenlistment bonuses (VRB's)⁷⁹ which he would receive upon the commencement of the extended period of service. However, in July 1972 (while he was still serving under his original four-year enlistment) the Navy discontinued the payment of VRB's for the critical military skill in which Larionoff was qualified. When he commenced his two-year extension of service, he was paid the Regular Reenlistment Bonus.

Larionoff was joined by other servicemembers in a class action suit brought under the Tucker Act⁸⁰ to recover amounts allegedly due under the VRB's. The federal district court granted relief and declared that if the servicemembers were bound to the reenlistment contracts from the time of their execution, then mutuality of agreement required that the Government also be bound by its promise to pay the bonuses. The court noted that the language of the contract must be considered in light of the situation and relationship of the parties, the circumstances surrounding them at the time of the contract, the nature of the subject matter, and the purpose of the contract. Here, because the servicemembers had relied upon the in-

Bemis v. Whalen because of the delay in receiving the promised benefits.

⁷⁶ The Statement of Understanding provided in part: "To remain eligible for the one year formal nuclear training, personnel must continually display excellent military performance and demonstrate the academic potential to complete Nuclear Power School by standing in the upper two-thirds of their basic "A" School class." The court did not read this provision as requiring academic "excellence" at the preschool although it might be argued that the Navy was justified in dismissing Novak for failure to "continually display excellent military performance" (posting below average grades in the preschool).

⁷⁷ 365 F. Supp. 140 (D.D.C. 1973), *aff'd*, 533 F.2d 1167 (D.C. Cir. 1976), *aff'd*, 97 S.Ct. 2151 (1977).

⁷⁸ 365 F. Supp. at 144.

⁷⁹ The circuit court reviewed the early statutes providing for monetary bonuses. See 533 F.2d 1167, 1173 nn. 16 & 17 (D.C. Cir. 1976).

⁸⁰ 28 U.S.C. § 1346(a)(2) (1970).

ducement of the bonus and because the Government had received the bargained-for services from the enlistees, the Government was bound to pay the vested bonuses to those who had signed their contracts for extension prior to the Navy's announced termination of the VRB's in March 1972.

The decision was affirmed by the circuit court.⁸¹ In its affirmance the court rejected the government's argument that the servicemembers were entitled only to the VRB (if any) in effect when they actually entered into the period of extended service. It accepted the servicemembers' argument that they had signed their extension contracts in consideration of, among other things, the VRB. The court further noted:

The Government authored those extensions contracts, and it could easily have inserted a provision limiting an enlisted member's VRB eligibility to the award level in effect on the date of actual entry into the period of extended service. Undoubtedly, if such a provision had been included, the Navy would have witnessed fewer extensions of enlistment. But there is no express limitation on eligibility, and the Government is therefore bound by the actual contract terms and the applicable military regulations.⁸²

Continuing, the court held that servicemembers who had signed their extension agreements prior to congressional termination of the VRB's in 1974⁸³ were also entitled to their bonuses:

Since contractual rights against the government are property interests protected by the Fifth Amendment, Congressional power to abrogate existing government contracts is narrowly circumscribed. . . . And although Congress may constitutionally impair existing contract rights in the exercise of a paramount governmental power such as the "War Powers," . . . Congress is "without power to *reduce expenditures* by abrogating contractual obligations of the United States."⁸⁴

Because the court could find no basis in the legislative history to establish that Congress was exercising some paramount power which might justify abrogation of existing contract rights, the contractual entitlement to the VRB stood unimpaired.

The Supreme Court, in a five-to-four decision, affirmed the circuit court's decision.⁸⁵ However, the Court based its decision on congressional control over military pay and did not treat the serv-

⁸¹ 533 F.2d 1167 (D.C. Cir. 1976); *accord* *Caola v. United States*, 404 F. Supp. 1101 (D. Conn. 1975).

⁸² 533 F.2d at 1178 (footnote omitted).

⁸³ Act of May 10, 1974, Pub. L. No. 93-277, § 2611, 88 Stat. 119.

⁸⁴ 533 F.2d at 1179 (citations omitted).

⁸⁵ 97 S. Ct. 2151 (1977).

icemembers' claims as contractual.⁸⁶ Justice Brennan, writing for the majority, reviewed the legislative history of the VRB's and concluded:

The clear intention of Congress to enact a program that "concentrates monetary awards at the first re-enlistment decision point where the greatest returns per retention dollar can be expected," could only be effectuated if the enlisted member at the decision point had some certainty about the incentive being offered. Instead, the challenged regulations provided for a virtual lottery. We therefore hold that insofar as the Defense Department regulations required that the amount of the VRB to be paid to a servicemember who was otherwise eligible to receive one be determined by the award level as of the time he began to serve his extended enlistment, they are in clear conflict with the congressional intention in enacting the VRB program, and hence invalid.⁸⁷

Consequently, Larionoff and the members of his class were entitled to bonuses computed at the level in effect when they agreed to extend their enlistments. Likewise, those who had agreed to, but had not actually commenced their periods of extended service prior to congressional termination of the VRB's in 1974 were entitled to bonuses computed at the level in effect when they agreed to extend their enlistments. The Court predicated this holding on the fact that nothing in the language of the 1974 Act expressed an intention to affect the rights of servicemembers who had previously extended their enlistments.⁸⁸

Larionoff does reinforce the line of cases which have treated

⁸⁶ "[T]he rights of the affected service members must be determined by reference to the statutes and regulations governing the VRB, rather than to ordinary contract principles. 45 U.S.L.W. at 4651 (citation and footnote omitted).

⁸⁷ *Id.* at 4654. Mr. Justice White, in a dissent in which Chief Justice Burger and Justices Blackmun and Rehnquist joined, noted that those who had executed re-enlistment agreements had no vested right to any particular pay, allowance, or benefit and that any cancellation of the VRB prior to the commencement of the extended period of service was not forbidden by law. *Id.* at 4655. The Court noted that a constant theme in the hearings, committee reports, and the floor debates was the argument that the VRB would be effective as an inducement to reenlist because it would be provided at the "decision point." *Id.* at n.17. In this case Larionoff's decision point was in 1969 when he executed both his enlistment and extension agreements.

⁸⁸ The Court noted that its decision on this point was in conflict with the circuit court opinions in *Collins v. Rumsfeld*, 542 F.2d 1109 (9th Cir. 1976), *vacated* sub nom. *Sailors v. United States*, 45 U.S.L.W. 3818 (June 21, 1977) and *Carini v. United States*, 528 F.2d 738 (4th Cir. 1975), *vacated*, 45 U.S.L.W. 3818 (June 21, 1977), where the courts had equated bonuses to other forms of pay controlled by Congress and found no basis for holding that the right to the bonuses had accrued before the 1974 Act. The decisions seemed to rest on the traditional proposition that the Congress, in exercise of its paramount powers, could exercise a great deal of control over questions of military pay.

areas of pay and other monetary benefits as questions of statute and not contract. The decision should therefore be limited to its facts and should not be construed as a rejection of the growing body of law which views the soldier-state relationship as a matter of contract.

D. SUMMARY

The federal courts still pay the necessary homage to the Supreme Court's opinion in *United States v. Grimley*. Yet, there is a trend away from language in *Grimley* which indicated that "no breach of the contract destroys the new status. . . ." *Grimley*, of course, dealt only with the criminal aspects of an enlistment contract. Contemporary federal courts are dealing primarily with the civil aspects, namely questions of contract performance. Cases such as *Novak v. Rumsfeld* may portend widespread abrogation of enlistment contracts where the Government has materially breached the agreement. Whether the federal courts on the whole will at some point completely disregard the peculiar status-creating nature of the enlistment contract and treat both the Government and servicemember as private parties remains to be seen.⁸⁹ That approach has been suggested.⁹⁰

V. THE MILITARY PERSPECTIVE: THE ENLISTMENT IS PRIMARILY A CHANGE OF STATUS

While at first blush there would not seem to be any variance, there are important distinctions in the approaches taken by the federal courts and the military judicial system. As noted in the preceding section, the federal courts generally utilize principles of contract law when determining the validity of an enlistment agreement. The military courts do not.⁹¹ However, the administrative opinions rendered by the Army's Judge Advocate General⁹² do indicate some

⁸⁹ *Adams v. Clifford*, 294 F. Supp. 1318 (D. Hawaii 1965). Once formed, the particular status is not easily set aside. Illegality or material breach must be shown. See, e.g., *In re Green*, 156 F. Supp. 174 (S.D. Cal. 1957).

⁹⁰ Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121 (1974).

⁹¹ In this article a distinction is made between federal courts and the military courts. The former are established pursuant to Article III of the United States Constitution. The latter are formed under the provisions of Article I, § 8 of the United States Constitution.

⁹² For purposes of this article, the term "The Judge Advocate General" will be used to designate The Judge Advocate General of the Army.

application of contract principles. The distinctions in the positions of the military courts, the Office of The Judge Advocate General, and the federal courts have not always been so clear.

A. THE MILITARY AND FEDERAL PERSPECTIVES— ONE AND THE SAME

Because early courts-martial were not subject to judicial review within the military,⁹³ there is no early military judicial position on the question of enlistments. However, military treatises⁹⁴ and opinions by the Office of The Judge Advocate General of the Army provide a rich source of material which reveal the early military approaches to enlistments.

The treatises are instructive. Colonel Winthrop's coverage of the area seems thorough and closely linked to the federal perspective. Who influenced whom is not clear.⁹⁵ One thing is clear: until the middle of the twentieth century the military departments considered enlistment contracts to be personal service contracts. The enlistment contract was peculiar, but it was nonetheless a contract to be interpreted by application of contract law.

The early military position was comparable to that taken by the Supreme Court and lower federal courts when faced with an irregular enlistment. Drawing heavily from both state and federal decisions, the military writers and the Army's Judge Advocate General followed those decisions almost to the letter:

- a. Statutory requirements were for the benefit of the Government and a statutorily defective enlistment was voidable, not void, unless the enlistee was without legal capacity to contract by reason of intoxication, insanity or youth.⁹⁶
- b. Contravention of military regulations did not per se affect the validity of the contract. The contract would be voidable.⁹⁷

⁹³ A convicted servicemember could seek a writ of habeas corpus on the basis that his court-martial lacked jurisdiction to try him. *See* *Dynes v. Hoover*, 61 U.S. (20 How.) 65 (1858).

⁹⁴ G. DAVIS, *A TREATISE ON THE MILITARY LAW OF THE UNITED STATES* (1898); W. WINTHROP, *MILITARY LAW AND PRECEDENTS* (2d ed. 1920 reprint).

⁹⁵ Winthrop's work was cited numerous times by the federal courts, and in at least one case Winthrop was a counsel of record. *See In re McVey*, 23 F. 878 (D. Cal. 1885).

⁹⁶ W. WINTHROP, *supra* note 94, at 545. *But see* note 102 and accompanying text *infra*.

⁹⁷ G. DAVIS, *supra* note 94, at 349; W. WINTHROP, *supra* note 94, at 546.

- c. Once a contract was entered into, a breach by the enlistee would not automatically void the contract. Likewise, the Executive could not materially alter the terms of the contract authorized by Congress.⁹⁸

These general principles varied little until the post-World War II years when Congress, in reorganizing the military judicial system, created an appellate judicial tribunal to review courts-martial.⁹⁹

B. THE FEDERAL VIEW AND THE MILITARY VIEW: A PARTING OF THE WAYS

The new United States Court of Military Appeals was soon confronted with the enlistment questions which the federal and state courts had reviewed many times during the preceding 150 years. The court, citing the rationale of *Grimley*, reiterated that an enlistment is a contract which gives rise to a status.¹⁰⁰ In *United States v. Blanton*¹⁰¹ the accused had enlisted at the age of fourteen years and went AWOL one day before his sixteenth birthday. According to the court, his enlistment was void¹⁰² because he had at no time served in the Army when he was legally competent to do so.¹⁰³ The Government's argument, that the minimum age requirement was for the benefit of the Government, was rejected. The capacity of a minor to change his status, the court stated, had been limited by statute.¹⁰⁴ In language which set the tone for things to come the court noted:

An agreement to enlist in an armed service is often referred to as a

⁹⁸ G. DAVIS, *supra* note 94, at 349; W. WINTHROP, *supra* note 94, at 547.

⁹⁹ The United States Court of Military Appeals was established by the Uniform Code of Military Justice, Act of May 5, 1950, ch. 169 (art. 67), 64 Stat. 129 (codified in 10 U.S.C. § 867 (1970)).

¹⁰⁰ *United States v. Downs*, 3 C.M.A. 90, 11 C.M.R. 90 (1953).

¹⁰¹ 7 C.M.A. 664, 23 C.M.R. 128 (1957).

¹⁰² In *Blanton* the Government argued that at the most, the minor servicemember's enlistment was "voidable." That position reflected a longstanding policy which had been asserted by the framers of the 1928 and 1949 Manuals for Courts-Martial and the Army's Judge Advocate General. See JAG 250.4, 11 May 1918, as digested in DIG. OPS. JAG 1912-1940 § 359(c)(3), at 163; MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1928, para. 157; MANUAL FOR COURTS-MARTIAL, U.S. ARMY, 1949, para. 189. There was no such reference in the 1951 Manual for Courts-Martial. Army Reg. 615-362, para. 15 (14 July 1947), provided that commanders could review the enlistment of a minor and use discretion in retaining or discharging him. That provision was rescinded in Army Reg. 615-362, para. 15 (14 July 1948).

¹⁰³ 10 U.S.C. § 3256 (1956) (repealed 1968).

¹⁰⁴ The court virtually ignored the massive body of federal law (*Grimley* and *Morrissey's* progeny) which had applied contract principles in determining the validity of enlistment contracts.

contract. However, more than a contractual relationship is established. What is really created is a status. As a result, no useful purpose is served by reviewing the common-law rules of contract and whether the contract of a minor is, under the common law, voidable at his election and in his own time, with or without formal proceedings. The United States Supreme Court has emphasized that the "age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature." We must, therefore, look to the statutes to determine whether Congress has established a minimum age at which a person is deemed incapable of changing his status to that of a member of the military establishment.¹⁰⁵

Later opinions of that court specifically cite the *Blanton* opinion for the proposition that "[e]nlistment in the armed forces does not establish a contract relationship between the individual and the Government, but a status."¹⁰⁶ The court has continued to emphasize that point.¹⁰⁷

What effect, if any, does the difference in approach to enlistments have? If the enlistment contract is viewed as a voluntary agreement which changes status but nonetheless creates a contractual or quasi-contractual relationship, then broader principles of contract law may be applied to determine both the existence of an agreement and the parties' respective rights and obligations under such an agreement. If, on the other hand, the enlistment is viewed primarily as a voluntary change of status from civilian to soldier, then the statutory requirements which control the process of effecting this "change" become the operative legal principles and other concepts

¹⁰⁵ 7 C.M.A. at 665, 23 C.M.R. at 129.

¹⁰⁶ *United States v. Hout*, 19 C.M.A. 299, 41 C.M.R. 299 (1970). See also *United States v. Anderson*, 51 C.M.R. 45 (A.F.C.M.R. 1975).

¹⁰⁷ Through this opinion and in many others which followed, the Court of Military Appeals has emphasized the word "status" when citing the familiar language from *Grimley*. See, e.g., notes 118, 119 & 120 and accompanying text *infra*. See also *Taylor v. Reasor*, 19 C.M.A. 405, 42 C.M.R. 7 (1970); *United States v. Noyd*, 18 C.M.A. 483, 40 C.M.R. 195 (1969); *United States v. Anderson*, 51 C.M.R. 45 (A.F.C.M.R. 1975). The military courts' view of the enlistment as primarily a change of "status" seems especially strong in those cases where an accused servicemember argues that because his term of agreed service has passed, the court-martial has no jurisdiction. Perhaps the courts fear that viewing the enlistment as a contract will strengthen the servicemember's argument. If so, that fear is unfounded. The enlistment contract provides that the terms of the agreement are also governed by statutes and regulations. See *Goldstein v. Clifford*, 290 F. Supp. 275, 279 (D.N.J. 1968). Controlling statutes and regulations provide for court-martial jurisdiction over persons whose term of enlistment has expired. See, e.g., 10 U.S.C. § 803 (1970); note 170 and accompanying text *infra*. The fact that in certain cases status may continue past the term provided for in the enlistment contract does not compel the conclusion that no contractual relationship has existed between the Government and the servicemember.

tend to become obscured. Under such a "status" analysis, if the statutory and regulatory requirements are not met, the enlistment may be ruled invalid because the Government has failed to follow its own regulations. A brief overview of the military position confirms this. The military's judicial and administrative opinions tend to fall within two major areas:

- a. Those cases where the enlistment contract was executed in contravention of statutes or military regulations, and
- b. Those cases where a "breach" (by either party) of the enlistment contract has taken place.

C. ENLISTMENTS VIOLATING STATUTES OR REGULATIONS

Most statutory irregularities are found in the category of minority enlistments.¹⁰⁸ In cases where the validity of a minority enlistment has been raised, the military courts and The Judge Advocate General have followed the *Blanton* rationale that Congress has promulgated the standards for changing status from civilian to soldier.¹⁰⁹ By looking exclusively at the statutory formalities required to change an individual's status, the courts and The Judge Advocate General have not given adequate attention to *Morrissey's* reliance

¹⁰⁸ The following are minority enlistment cases: *United States v. Graham*, 22 C.M.A. 75, 46 C.M.R. 75 (1972); *United States v. Lenoir*, 18 C.M.A. 387, 40 C.M.R. 99 (1969); *United States v. Bean*, 13 C.M.A. 203, 32 C.M.R. 203 (1962) (numerous citations to minority enlistment cases); *United States v. Scott*, 11 C.M.A. 655, 29 C.M.R. 471 (1960); *United States v. Overton*, 9 C.M.A. 684, 26 C.M.R. 464 (1958); *United States v. Reese*, 9 C.M.A. 205, 25 C.M.R. 467 (1958); *United States v. Howard*, 51 C.M.R. 371 (A.F.C.M.R. 1975); *United States v. Garback*, 50 C.M.R. 673 (A.C.M.R. 1975); *United States v. Brodigan*, 50 C.M.R. 419 (N.C.M.R. 1975); *United States v. McNeal*, 49 C.M.R. 668 (A.C.M.R. 1974) (minor enlisted while in reform school); *United States v. Alston*, 48 C.M.R. 733 (A.F.C.M.R. 1974); *United States v. Mills*, 44 C.M.R. 460 (A.C.M.R. 1971); *United States v. Liggins*, 43 C.M.R. 534 (A.C.M.R. 1970); *United States v. Williams*, 39 C.M.R. 471 (A.B.R. 1968) (although void minority enlistment may be converted to voidable enlistment at age seventeen, here there was insufficient indication of constructive enlistment where accused served for only five days after seventeenth birthday before going AWOL); *United States v. Graves*, 39 C.M.R. 438 (A.B.R. 1968) (discussion of federal minority cases); *United States v. Fant*, 25 C.M.R. 643 (A.B.R. 1958); *United States v. DeGraffenreid*, 23 C.M.R. 659 (N.B.R. 1957).

¹⁰⁹ See, e.g., DAJA-AL 1976/5073, 30 July 1976 (statutory qualifications regarding age). The Secretary of the Army may prohibit or restrict individuals from enlisting except in those cases where a person is granted a statutory right to enlist. For example, he may temporarily restrict enlistment of persons who are not high school graduates. See DAJA-AL 1976/4895, 21 June 1976.

on the fact that Congress had authorized sixteen-year olds to "contract" with the military.¹¹⁰

In *United States v. Robson*¹¹¹ the accused was a Canadian who had fraudulently represented himself to be a United States citizen when he enlisted. The Army Board of Review rejected the defense argument that the accused had been incompetent to enlist because he was not a citizen as required by the statute. According to the board, Robson was presumed to be competent to enlist; therefore, the *Blanton* rationale did not apply and the accused was subject to court-martial jurisdiction. In its holding the board recognized that in the past, Congress had permitted enlistment of a limited number of aliens under specific conditions.¹¹²

Statutory language prohibiting enlistment of persons who are intoxicated¹¹³ was not seen as a disability in *United States v. Julian*.¹¹⁴ When confronted with arguments that the enlistment was void, the court said:

We need not answer any of these precise questions as all are premised upon the illegality of an enlistment of an intoxicated person. We do not hold that such enlistments are either void or *void ab initio* as claimed. We find it unnecessary to examine the fineness of the contentions.

As we conceive the argument brought here the question for our consideration is not to determine the legality, *vel non* of a contract of enlistment regular on its face, but whether the court below possessed the legal power to try appellant for his military offenses because appellant was in *actual service*. This is what the trial judge found even conceding the fact that he found the accused was intoxicated at the time he was enlisted.

Appellant's enlistment contract having been executed, albeit accomplished as he now contends, while intoxicated, it does not follow that he can escape either his court-martial or its penalty.¹¹⁵

¹¹⁰ The Supreme Court stated: "The age at which an infant shall be competent to do any acts or perform any duties, military or civil, depends wholly upon the Legislature." 137 U.S. at 159. Considering the fact that the Court was speaking to the question of the validity of contracts of enlistment, the above language implies that Congress had authorized sixteen-year-olds to enter enlistment *contracts*. And in *United States v. Williams*, 302 U.S. 46 (1937), the Supreme Court stated that by enacting legislation governing enlistments, Congress had declared who was capable of making *contracts* to enter military service.

¹¹¹ 24 C.M.R. 375 (A.B.R. 1957).

¹¹² 10 U.S.C. § 621c (1950) (Lodge Act) (expired June 30, 1959). The current statute is 10 U.S.C. § 3253 (1978). See also note 49 *supra*. The court believed that the statute embodied the policy that military service will, in general, be performed by citizens rather than foreign mercenaries.

¹¹³ 10 U.S.C. § 504 (1970).

¹¹⁴ 43 C.M.R. 876 (N.C.M.R. 1971).

¹¹⁵ *Id.* at 877.

The rationale for sustaining jurisdiction rested on the policy that once a soldier commits a crime, the validity of his enlistment cannot be used as a bar to jurisdiction.¹¹⁶

Recent cases have considered the effect of violations of regulations during the enlistment process. Almost all aspects of the enlistment procedure are now covered by regulations.¹¹⁷ A quick review of the pertinent regulations reveals many possibilities for claiming that an enlistment is invalid because the military did not follow its own regulations. The principal cases dealing with this contention are the Court of Military Appeals' decisions in *United States v. Catlow*,¹¹⁸ *United States v. Brown*,¹¹⁹ and *United States v.*

¹¹⁶ The court was making a distinction between *de facto* service and *de jure* service. In doing so it fell in line with the federal opinions which either made the distinction or simply decided that pending charges temporarily mooted the issue of validity of the enlistment. No mention was made of the concept of "constructive enlistments." See note 227 *infra*. See *In re McVey*, 23 F. 878 (D. Cal. 1885); note 45 and accompanying text *supra*.

¹¹⁷ The basic Army regulation governing enlistments in Army Reg. No. 601-210, Regular Army Enlistment Program (15 Jan. 1975). It spells out in detail how enlistments are to be effected and where necessary, refers the reader to the other regulations governing the processing of recruits. See, e.g., Army Reg. No. 611-5, Army Personnel Tests (1 Oct. 1975); Army Reg. No. 340-18-7, Maintenance and Disposition of Military Personnel Functional Files (14 Aug. 1969); Army Reg. No. 601-270, Armed Forces Examining and Entrance Stations (18 Mar. 1969); Army Reg. No. 611-201, Enlisted Career Management Fields and Military Occupational Specialties (1 Oct. 1973); Army Reg. No. 40-501, Standards of Medical Fitness (5 Dec. 1960); Army Reg. No. 601-208, Recruiting/Reenlistment Publicity Program (15 May 1973).

¹¹⁸ 23 C.M.A. 142, 48 C.M.R. 758 (1974) (no court-martial jurisdiction over "coerced" volunteer). The problem of "coerced volunteers" is ageless. The decision in *Catlow* gives no real indication of the Army's long campaign to eliminate the practice of offering an offender the choice of going to jail or joining the Army. See DAJA-AL 1976/4356, 19 May 1976. The court did refer to a letter from the Army's Judge Advocate General to various chief justices which solicited assistance in stopping the practice. The court noted that "implicit in the letter were findings of fact predicated upon empirical experience." If such data existed it was not presented by the defense. Nonetheless the court determined that the regulation prohibiting such enlistments was also for the benefit of the soldier. The case prompted a number of articles and cases. See, e.g., *United States v. Barret*, 23 C.M.A. 474, 50 C.M.R. 493 (1975); *United States v. Dumas*, 23 C.M.R. 278, 49 C.M.R. 453 (1975); *United States v. Martinez*, 52 C.M.R. 59 (A.C.M.R. 1976); *United States v. Barksdale*, 50 C.M.R. 430 (N.C.M.R. 1975); *United States v. Ross*, NCM 75 1292 (N.C.M.R. 20 Mar. 1975) (unpublished); *United States v. Day*, NCM 75 0053 (N.C.M.R. 9 Sept. 1974) (unpublished); Dilloff, *The Involuntary Volunteer: Coerced Military Enlistments*, 25 AM. U. L. REV. 437 (1976); Ziegler, *The Impact of United States v. Catlow* (March 1976) (unpublished paper in The Judge Advocate General's School, United States Army).

Recently the Army Court of Military Review affirmed a finding of jurisdiction over a "coerced inductee" who had submitted to induction in return for dismissal of draft law violation indictments. The court distinguished *Catlow* and noted that the accused had no right to be free of the draft. See *United States v. Wood*, 54

Russo,¹²⁰ although these decisions do not stand alone.¹²¹

Of the three, *Russo* presents the greatest insight into the potential problems presented by enlistments which in some form violate a regulation. Russo suffered from dyslexia, a nervous condition which severely impairs the ability to read. Both he and his mother informed the recruiter of his disability; the recruiter then provided Russo with a list of numbers and letters to put on the Armed Forces Qualifications Test. Russo was enlisted, and later tried and convicted by a court-martial. On appeal, he contended that he was not subject to court-martial jurisdiction. The Court of Military Appeals agreed and set aside his conviction.

The court noted that the controlling regulations are for the ultimate protection of the individual, and that the recruit "can best as-

C.M.R. Adv. Sh. 345 (A.C.M.R. 1976). See also *Korte v. United States*, 260 F.2d 633, 635 (9th Cir. 1958), *cert. denied*, 358 U.S. 928 (1959) (no man has constitutional right to be free from call to military service).

¹¹⁹ 23 C.M.A. 162, 48 C.M.R. 778 (1974). Brown, age sixteen, bribed and forged his way into the Army by presenting himself as a seventeen-year-old who possessed the parental consent required for enlistment at his age. The facts were contested by affidavits on appeal. In reversing the Army Court of Military Review's decision, which found jurisdiction based upon a constructive enlistment, the Court of Military Appeals held that "fairness" prevented the Government from relying on a constructive enlistment as a basis for court-martial jurisdiction. According to the court, the Government was estopped because (1) the recruiter had failed to witness the "forged" parental consent form and (2) Brown's company commander had not acted properly after receiving notice of Brown's true age. The court noted that ordinarily an enlistee under the age of seventeen may constructively enlist where he continues to serve after passing the minimum statutory age. Before reaching that minimum age, however, he was "statutorily incompetent to acquire military status." 23 C.M.A. at 164, 48 C.M.R. at 780. The Army's Judge Advocate General later ruled that Brown's service records, under the regulations, could not reflect any bar to enlistment. See DAJA-AL 197513991, 22 May 1975. Brown, whose conviction for robbery was nullified, could again enlist in the armed services, assuming he met other eligibility requirements.

¹²⁰ 23 C.M.A. 511, 50 C.M.R. 650 (1975).

¹²¹ In the following cases the enlistments were challenged on the grounds that the Government failed to follow its regulations: *United States v. Muniz*, 23 C.M.A. 530, 50 C.M.R. 669 (1975); *United States v. Bobkoskie*, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); *United States v. Ruggerio*, 54 C.M.R. Adv. Sh. 683 (N.C.M.R. 1977); *United States v. Robinson*, 51 C.M.R. 838 (N.C.M.R. 1976); *United States v. Jones*, 50 C.M.R. 92 (A.C.M.R. 1975); *United States v. Huddleston*, 50 C.M.R. 99 (A.C.M.R. 1975); *United States v. Bunnell*, 49 C.M.R. 64 (A.C.M.R. 1974); *United States v. Deville*, 49 C.M.R. 263 (A.C.M.R. 1974); *United States v. Parker*, 47 C.M.R. 762 (C.G.C.M.R. 1973); *United States v. Holloway*, 18 C.M.R. 909 (A.F.B.R. 1955); *United States v. Perry*, 1 C.M.R. 516 (N.B.R. 1951); *United States v. Mott*, NCM 75 1940 (N.C.M.R. 20 Oct. 1975) (unpublished); *United States v. Van Allen*, NCM 75 1516 (N.C.M.R. 12 Sept. 1975) (unpublished); *United States v. Rios*, NCM 75 0787 (N.C.M.R. 31 July 1975) (unpublished). See also *United States v. Burden*, 23 C.M.A. 510, 50 C.M.R. 649 (1975) (court cited *Russo* in voiding induction); *United States v. Arthur*, 51 C.M.R. 757 (A.C.M.R. 1975) (court voided inductions because Government failed to follow regulations).

sure enforcement" of such protections.¹²² Because the regulations in question are for the protection of the individual's personal liberties or interests, the court noted that the Government is bound to abide by its own rules and regulations.¹²³ Citing language from *Grimley*, the court stated that the Government may not knowingly violate its own regulations by entering into "illegal enlistment contracts" and then "rely upon the change of status doctrine as a shield to avoid judicial scrutiny. To so conclude would be to countenance on behalf of recruiters the very procedure found objectionable in *Grimley*." ¹²⁴ The court continued:

Because fraudulent enlistments are not in the public interest, we believe that common law contract principles appropriately dictate that where recruiter misconduct amounts to a violation of the fraudulent enlistment statute, as was the situation here, the resulting enlistment is void as contrary to public policy. Hence the change of status alluded to in *Grimley* never occurred in this case.¹²⁵

The court optimistically added that its holding would have the "salutary effect of encouraging recruiters to observe applicable re-

¹²² 23 C.M.A. at 512, 50 C.M.R. at 651. The regulatory provision (Trainability Requirements) in question was Rule C, Tables 2-1 and 2-2, Army Reg. No. 601-210, Personnel Procurement, Regular Army Enlistment Program (24 Mar. 1969). The court in effect disregarded the *Grimley* language which stated that such qualifications were for the benefit of the Government.

¹²³ See 23 C.M.A. at 512, 50 C.M.R. at 651. The court's reliance on *American Farm Lines v. Black Ball Freight*, 397 U.S. 532 (1970) was misplaced. In that case the procedural regulations were for the benefit of the Government (ICC), not the complaining individuals. The court stated: "[I]t is always within the discretion of a court or an administrative agency to relax or modify its procedural rules adopted for the orderly transaction of business before it when in a given case the ends of justice require it." 397 U.S. at 553. *United States v. Shaughnessy*, 347 U.S. 260 (1954), also relied upon to support this position, can likewise be readily distinguished from *Russo*. In *Shaughnessy*, the Court was concerned with the legality of the Attorney General side-stepping existing regulations and depriving an alien of his "right" to a fair hearing before the Board of Immigration Appeals. The regulation in question was clearly instituted for the benefit of aliens facing deportation.

Only by using strained logic can it be argued that the eligibility criteria in question (Army Reg. No. 601-210) were intended for the *primary* benefit of the servicemembers. The general rule is that the regulation in question must be for the *primary* benefit of the complaining party. At best, the Court of Military Appeals in *Russo* only delineated collateral benefits to the enlistee.

¹²⁴ The "procedure found objectionable in *Grimley*" must have been *Grimley's* argument that *his* fraud served to void his enlistment. See 137 U.S. at 150-51. The Court of Military Appeals seems to be laboring under the false assumption that sustaining jurisdiction will countenance the illegal actions of the recruiter. If the recruiter has violated applicable statutes or regulations, administrative and/or criminal sanctions should be imposed.

¹²⁵ 23 C.M.A. at 513, 50 C.M.R. at 652.

cruiting regulations while also assisting the armed forces in their drive to eliminate fraudulent recruiting practices.”¹²⁶

The *Russo* rationale was galvanized in *United States v. Little*¹²⁷ where the recruiter, after having been told that the recruit was illiterate, allegedly assisted him on his second Armed Forces Qualifications Test by explaining the meaning of some of the words. This technical violation,¹²⁸ according to the court, succeeded in destroying the only vehicle available to determine literacy, one of the “essential prerequisites for enlistment.”¹²⁹

The long range effect of these cases is not clear.¹³⁰ The Court of

¹²⁶ *Id.* at 512, 50 C.M.R. at 651. In adopting what in effect amounts to an “exclusionary” rule, the court adopted an ironic twist in military law. Because the burden rests upon the Government to prove jurisdiction over the accused, the trial counsel is placed in the position of establishing the *innocence* of the recruiter. If he fails and the military judge dismisses the charges on the *Russo* rationale, does not that ruling amount to a finding that the recruiter’s “misconduct amounts to a violation of the fraudulent enlistment statute?” See UNIFORM CODE OF MILITARY JUSTICE art. 84, 10 U.S.C. § 884 (1970). If the Court of Military Appeals continues to bind itself to the *Russo* posture, then it should also adopt the rule that: (1) it must be presumed that the accused was competent to enlist; and (2) in order to rebut that presumption, the accused must show his disqualification *and* that recruiter misconduct, if any, amounted to an intentional violation of the fraudulent enlistment statute. For a discussion of the Government’s burden of proof in establishing jurisdiction see *United States v. Spicer*, 3 M.J. 689 (N.C.M.R. 1977); *United States v. Bobkoskie*, 54 C.M.R. Adv. Sh. 672 (N.C.M.R. 1977); *United States v. Brede*, NCM 76 1946 (N.C.M.R. 23 Feb. 1977) (unpublished); *United States v. Barefield*, NCM 76 0435 (N.C.M.R. 21 June 1976) (unpublished).
¹²⁷ 24 C.M.A. 328, 52 C.M.R. 39 (1976).

¹²⁸ In *Russo*, the court predicated avoidance of the enlistment on “violation of the fraudulent enlistment statute.” However, in *Little* the court voided the enlistment not on an intentional violation of the statute but rather on what could be characterized as a good faith effort on the part of the recruiter. The court, therefore, has not made a distinction between active misconduct and good faith “technical violations.” In *United States v. Holmes*, CM 433150 (A.C.M.R. 6 May 1976) (unpublished), the accused had enlisted in spite of mental and physical bars to enlistment. The court held that enlistment was void; while the accused’s allegation fell short of an affirmative showing of “misconduct,” it did establish that the recruiter was at least “negligent” in failing to investigate the accused’s qualifications. Accord, *United States v. Johnson*, NCM 76 0332 (N.C.M.R. 12 August 1976) (unpublished). *But* see *United States v. Ewing*, CM 43314 (A.C.M.R. 27 May 1977) (unpublished) and *United States v. Harrison*, NCM 77 0239 (N.C.M.R. 18 Aug. 1977) (unpublished) (negligence does not void enlistment).

¹²⁹ What is an “essential prerequisite for enlistment?” The court seems dangerously close to legislating prerequisites for military service. Establishing criteria for enlistment is a function of either Congress or the executive department. It is not a function of judicial bodies, federal or military. See, e.g., *United States v. Standard Oil Co.*, 332 U.S. 301, 316 (1947).

¹³⁰ At least one writer feels that these recent military cases have rung the death knell of the constructive enlistment concept. See Grayson, *Recent Developments in Court-Martial Jurisdiction: The Demise of Constructive Enlistment*, 72 MIL. L. REV. 117 (1976). However, several recent opinions have revitalized the concept. See, e.g., *United States v. Wagner*, CM 433607 (A.C.M.R. 20 Jul. 1977),

Military Appeals stated in *Russo* that it was applying common law contract principles, but an examination of the common law applications and a review of the court's prior positions on the subject indicate that the court was really applying a "change of status" test.¹³¹ The primary question, in the court's view, was: "Did the enlistment comport with all controlling statutes and regulations?"

These cases obviously deal with the limited question of court-martial jurisdiction, but the rationale has been adopted by The Judge Advocate General in dealing administratively with questionable enlistments.¹³² If it is determined by either the military courts or The Judge Advocate General that an enlistment is invalid,¹³³ collateral questions such as a servicemember's right to accrued pay and veterans' benefits arise.¹³⁴ Army regulations now facilitate

____ M.J. ____ (A.C.M.R. 1977); *United States v. De La Puente*, CM 434626 (A.C.M.R. 20 June 1977) (memorandum opinion). *See also* Morrow, Informal Entry Into the Military Service (1966) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

¹³¹ In *Russo*, *Catlow*, and *Brown* the Court of Military Appeals applied an estoppel theory which prevented the Government from arguing constructive enlistment. *See*, *United States v. Marshall*, 3 M.J. 612 (N.C.M.R. 1977). Under common law contract principles, the *Government is not estopped* by the unauthorized acts of one of its officials. *See United States v. Rossi*, 342 F.2d 505 (9th Cir. 1965) and the cases cited therein.

¹³² The decision in *Russo* required a shift in position for The Judge Advocate General on the subject of irregular enlistments. *See* DAJA-AL 197515179, 4 Nov. 1975. The earlier position had declared that an enlistment entered with frauds being committed by both the enlistee and the recruiter was voidable, not void. *See* DAJA-AL 197514137, 9 July 1975. For a discussion of irregular enlistments preceding *Russo*, *see* Goddard, Constructive and Fraudulent Enlistment (1962) (unpublished thesis in The Judge Advocate General's School, U.S. Army).

¹³³ A great deal of confusion in this area would be eliminated by declaring the enlistment contract in question to be either voidable or valid. Corbin points out that one who says that an "agreement or promise is 'void' usually supposes that it has no legal operation whatever; being in many cases quite unaware that a number of important legal relations have been created." 1 A. CORBIN, CONTRACTS 15 (1963). The legal relation formed here would be the servicemember's "status." Status is not solely dependent upon a valid enlistment contract. That concept has been recognized by the Court of Military Appeals, *see United States v. King*, 28 C.M.R. 243 (1959) (dictum), and the military in general since 1896. *See* DIG. OPS. JAG 1912 *Enlistments* para. 1A-3c, at 603-04 (1896); *accord*, *United States v. Reaves*, 126 F. 127, 133 (5th Cir. 1903) (enlistment in the Army may be annulled and vacated but its effects remain); *United States v. Luce*, 2 C.M.R. 734 (A.F.B.R. 1951) (court cites numerous authorities for proposition that fraudulent enlistment has both civil and criminal effects; enlistment may be void for civil purposes but not criminal purposes). To simply declare enlistments "void" often ignores years of valuable and good faith service of a soldier. If an enlistment is considered voidable, the servicemember can at least argue ratification.

¹³⁴ Relying on opinions of the Comptroller General, the Army's Judge Advocate General has ruled that once it is determined that an individual is serving under a void enlistment, he is not entitled to any further pay. *See* DAJA-AL 197614202, 30 Mar. 1976. *See also* DAJA-AL 197513991, 24 Jan. 1975: 55 Comp. Gen. 1421 (1976);

summary separation of a servicemember who claims to have fraudulently enlisted with recruiter connivance.¹³⁵ If in fact the enlistment is determined to be void, the individual is released without a discharge and the appropriate personnel forms are completed to show "no service."¹³⁶

D. BREACH OF THE ENLISTMENT CONTRACT

Although the military courts and The Judge Advocate General consider the enlistment to be primarily a question of status when reviewing the basis of court-martial jurisdiction, The Judge Advocate General does consider the enlistment to have the "attributes of the contract" when determining whether there has been a breach of the enlistment agreement.¹³⁷ Misconduct by the soldier can be compared to a breach of contract because the soldier has impliedly

54 Comp. Gen. 291 (1974); 47 Comp. Gen. 671 (1968); 39 Comp. Gen. 360 (1960); 39 Comp. Gen. 742 (1960).

¹³⁵ See DAPC-EPA-A302228Z Mar. 76, SUBJ: Interim Change to AR 635-200 and 635-206. See also DAPE-MPR 3013002 Nov. 76, SUBJ: Processing Fraudulent Enlistments Involving Improper Aid by Recruiting Officials (so-called Recruiter Connivance); DAPE-MPE-PS 0113592 Dec. 76, SUBJ: Clarification of Recruiter Connivance Procedures in Chapter 14, 635-200. Pursuant to these message changes, a commander must void the enlistment if after reasonable inquiry it appears that recruiter connivance was involved. Recruiter connivance does not void the enlistment unless (1) the eligibility requirement in question actually amounted to a disqualification and (2) the disqualifying feature actually existed at the time of enlistment. If the enlistment is void, a commander exercising general court-martial jurisdiction may authorize immediate enlistment of an individual who:

- (1) Requests such enlistment; and
- (2) Either has no prior service, or if prior service, was eligible at the time of last separation for enlistment without waiver; and
- (3) Whose disqualification is waivable (except adult felony conviction); and
- (4) Has service prior to voidance which is of a character that clearly supports enlistment.

The individual's personnel records are changed to reflect that any period of voided service is not creditable for promotion or longevity.

¹³⁶ DAJA-AL 197515186, 29 Oct. 1975. Inequities do exist in such a process. The soldier who has served honorably forfeits arguably gained benefits and the military is subjected to possible enlistment of military offenders at a later time. The appropriate personnel form, DD 214 (Report of Separation From Active Duty) is completed in accordance with Army Reg. 635-5, Personnel Separations-Separation Documents (20 Aug. 1973). The information on this form may serve as a basis for determining what benefits, if any, the individual will receive.

Some of the inequities may be softened by The Judge Advocate General's opinion, DAJA-AL 1976/6028, 29 Dec. 1976. Where the servicemember has acquiesced in good faith to recruiter connivance, he should be separated, when necessary, under AR 635-200, para. 5-31, which gives recognition for previous service. For purposes of court-martial jurisdiction, however, no such distinction is made. According to *Russo*, the enlistment is void. DAJA-AL 197515186, 4 Dec. 1975.

¹³⁷ DAJA-AL 197515398, 2 Dec. 1975 (where servicemember agreed to serve in Korea for 12-month tour, no material breach occurred when Congress changed tour to 13 months). See also DAJA-AL 197514380, 16 July 1975 (distinguishing technical and material breaches).

agreed to serve in accordance with service regulations. If he fails to do so, the Government in its discretion may discharge him or may instead choose to discipline him and retain him for future service.¹³⁸

What if the Government acts in a manner inconsistent with the terms of the enlistment agreement? Most problems in this area arise in cases in which the servicemember enlists under one of the many options which may include either special training or choice of assignments. When he does not receive what he bargained for, he seeks relief. The Judge Advocate General has noted that in the absence of a supervening statute, emergency, or waiver, an enlistment is normally governed by general principles of contract law.¹³⁹ The Government is required to fulfill those commitments included in the enlistment contract.¹⁴⁰

But according to The Judge Advocate General, not all departures from the terms of the contract are "material breaches" which give rise to a remedy.¹⁴¹ If, for example, the servicemember receives an occupational specialty other than that promised, a material breach has not occurred if the servicemember's misconduct precluded the "option."¹⁴² If, however, the servicemember is blameless, a material breach serves as the basis for relief.¹⁴³ Until recently, temporary deployment (thirty days or less) of servicemembers who were promised specific units or geographical locations did not amount to a material breach.¹⁴⁴ Now, changes to enlistment option agreements

¹³⁸ The Government must retain flexibility in retaining or discharging soldiers. One reason for retaining a fraudulent or erroneous enlistee is purely economic in nature. Historically, the military has recognized the cost of training, housing, and feeding recruits. Recovering those expenditures from fraudulent enlistees who are discharged is impractical and the costs may be offset by retaining those enlistees and requiring them to fulfill their enlistment contracts. Although courts hesitate to specifically enforce personal service contracts, the military enlistment contract seems to be the exception. *See* Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121, 147 (1974).

¹³⁹ DAJA-AL 197515174, 6 Nov. 1975. *See also* DAJA-XL 197515398, 2 Dec. 1976; notes 66-69 and accompanying text *supra*.

¹⁴⁰ DAJA-AL 197615074, 6 Aug. 1976. *See also* DAJA-AL 1973/4142, 13 June 1973 (DD Form 4, enlistment contract, is of paramount significance in determining nature and duration of individual's military status).

¹⁴¹ *See* DAJA-AL 197514380, 16 July 1975, where a distinction is made between technical and material breaches—a distinction recognized by the federal courts. *See, e.g.,* Crane v. Coleman, 389 F. Supp. 22 (E.D. Pa. 1975); Bemis v. Whalen, 341 F. Supp. 1289 (S.D. Cal. 1972); *see* notes 70-75 and accompanying text *supra*.

¹⁴² DAJA-AL 197614881, 26 July 1976 (servicemember's misconduct made it impossible for him to serve in promised area; transfer by Army no breach). *See also* DAJA-AL 197214779, 28 Aug. 1972.

¹⁴³ The soldier may be separated under the provisions of AR 635-200, para. 5-32 (DAPC-PAS-IC 0714002 Feb. 75). *See also* DAJA-AL 197515354, 15 Dec. 1975 (servicemember received substantially different Military Occupational Specialty).

¹⁴⁴ DAJA-AL 197614881, 26 July 1976.

provide that servicemembers who enlist for special units or assignments may be deployed with those units.¹⁴⁵ Once undertaken, actions to discharge the servicemember for misconduct or because the Government has breached its "commitment" must be in compliance with due process protections either expressed or implied in the pertinent regulations.¹⁴⁶

If the servicemember feels that he has not received all that was promised him, he may not use the government's shortcomings as a defense to any misconduct or self-help actions.¹⁴⁷ His remedy lies in either seeking a discharge within military channels or testing the validity of his enlistment by means of a habeas corpus proceeding.¹⁴⁸ If the servicemember's position is sound, regulations require that corrective action be taken.¹⁴⁹

E. SUMMARY

The difference in the military and federal perspectives might be explained by simply recognizing that each body focuses on different facets of the enlistment. The contemporary federal courts focus on contractual (civil) aspects such as promised assignments, schooling, and pay. Contemporary military courts focus on the resulting military status for the purpose of determining court-martial jurisdiction (criminal aspects). Such an explanation is only superficial. The distinctions between the two perspectives run deeper; they are grounded on divergent views of the very nature of the soldier-state relationship. The federal courts view the relationship largely as a

¹⁴⁵ DAJA-AL 197713797, 30 Mar. 1977. The pertinent "Statement of Enlistment" (DA Form 3286-18) now provides in part:

e. In the event the unit or activity to which I am assigned or attached under the provisions of this option, or the subordinate element of the unit to which I am assigned or attached is deployed, inactivated, disbanded, discontinued, reorganized or redesignated prior to the expiration of the guaranteed minimum period of assignment, I will remain assigned to the activity, unit, or subordinate element of that unit or be reassigned, in accordance with the needs of the Army.

f. I may be subject to periods of temporary duty assignment on an individual basis away from the activity, unit or subordinate element of the unit for which enlisting. Such periods of temporary duty will not count against the guaranteed period of stabilization indicated in 1b, above.

¹⁴⁶ See note 129 *supra*.

¹⁴⁷ See, e.g., *United States v. Bell*, 48 C.M.R. 572 (A.F.C.M.R. 1974). Bell unsuccessfully argued at his court-martial that he had gone AWOL only after the Air Force's repeated failure to rectify what he considered false promises made by the recruiter.

¹⁴⁸ Service in the armed forces is considered sufficient deprivation of liberty to constitute "custody" for purposes of habeas corpus. See *Jones v. Cunningham*, 371 U.S. 236 (1962); *Hammond v. Lenfest*, 398 F.2d 705 (2d Cir. 1968).

¹⁴⁹ AR 635-200, para. 5-32 (DAPC-PAS-071400Z Feb. 75) details the procedures for actions on unfulfilled or erroneous enlistment commitments.

creature of contract where the relationship has been voluntarily assumed. The military courts tend to treat it as a creature of statutes and regulations.

Although it seems unlikely that the military courts will in the near future shift gears and recognize the contractual aspects of the enlistment, as long as the Government relies upon contractual promises to induce enlistment, disposition of both civil and criminal aspects should reflect that reliance.

The position of the present Court of Military Appeals on the question of enlistments is largely a reflection of its over all interest in protecting the rights of the individual servicemember.¹⁵⁰ The Government, therefore, must bear the heavy burden of satisfying all statutory and regulatory requirements when enlisting servicemembers. Failure to do so will probably not be fatal to the civil aspects of the enlistment (*e.g.*, enforcement of enlistment options) because general principles of contract law tend to be flexible. But, failure to adhere to statutory or regulatory provisions will, for the present, be fatal to the criminal, or jurisdictional, aspects. Is such a distinction necessary? The following sections examine the possibility of treating both criminal and civil enlistment problems in a uniform manner.

VI. THE ENLISTMENT: A UNIFORM APPROACH

Comparison of the early forms of the soldier-state relationship with today's form reveals significant differences. And despite the large amount of litigation, no satisfactory statutory definition of the relationship exists.¹⁵¹ Time and again the courts have struggled with the issue and in doing so have often only clouded the issue. In efforts to explain the relationship, courts have compared it to citizenship,¹⁵² marriage,¹⁵³ and the employer-employee relationship.¹⁵⁴

¹⁵⁰ See Cooke, *The United States Court of Military Appeals, 1975-1977: Judicializing the Military Justice System*, 76 MIL. L. REV. 43 (1977).

¹⁵¹ 10 U.S.C. § 501 (1970) simply states: "In this chapter 'enlistment' means original enlistment or reenlistment." Army Reg. 601-210, Regular Army Enlistment Program, para. 1-4e (C3, 1 Dec. 1975), is equally vague:

e. Enlistment A voluntary enrollment in the Regular Army as an enlisted member. An enlistment is consummated by subscription to the prescribed oath of enlistment. The term "enlistment," as used in this regulation, includes enlistment of both nonprior service and prior service personnel, with the latter category also including prior Army personnel and personnel with prior service in any of the other Armed Forces.

¹⁵² *United States v. Grimley*, 137 U.S. 147 (1890).

¹⁵³ *Id.*

¹⁵⁴ *Parker v. Levy*, 417 U.S. 733, 751 (1974). The Supreme Court noted that the relationship of the Government to members of the military is "not only that of lawgiver to citizen, but also that of employer to employee." The Court added that

A. THE SOLDIER-STATE RELATIONSHIP: WHAT IS IT?

In *United States v. Standard Oil Co.*¹⁵⁵ the court discussed the soldier-state relationship in the context of a suit brought by the Government to recover costs expended in treating a soldier negligently injured by the defendant. The court recognized the unique nature of the relationship but hesitated to label it as a master-servant or employer-employee relationship. Instead, the court viewed the Government obligations toward a soldier as "more legislative than contractual":¹⁵⁶

When a man becomes a soldier, a status is created whether the soldier enlists voluntarily or is selected under a Selective Service law. A voluntary enlistment originates in a contract for a definite period. But there any similarity between it and other contractual relationships, such as master and servant, ceases. The essence of the relation of master and servant is the freedom of the servant to end it, subject, of course, to responsibility for wrongful termination. But even a volunteer cannot withdraw from the army during the period of enlistment. Wrongful ending or even long, unexcused absence, is punishable as a crime both in peace and in war time.¹⁵⁷

The court continued in its effort to label the relationship by noting:

For, after making due allowance for the differences, we still have a cohesive pact which, like the pactum subjectionis—the pact between king and subject in mediaeval Europe—ties the soldier to the Government, at the same time reserving to each rights and obligations which flow from their union. Or we might apply to it the word which French jurists have coined to characterize certain solidarities which lie at the basis of social action—*institution*. Such *institution* gives rise to droit institutionnel, a body of rights arising from the communality of the group, such as the family, in which each member exercises certain rights and has obligations not as an individual, but as a member of the *institution*, according to the position he occupies—*suam cuique dignitatem*. These rights or obligations stem, not from the members as individuals (in the case of the family, parents or children), but from the basic fact which brought it into being (in the case of the family, marriage).¹⁵⁸

the Government is often "employer, landlord, provisioner, and lawgiver rolled into one." *Id.*

¹⁵⁵ 60 F. Supp. 807 (S.D. Cal. 1945), *rev'd on other grounds*, 153 F.2d 958 (9th Cir. 1946), *aff'd*, 332 U.S. 301 (1947) (judicial establishment of new grounds for liability would intrude into congressional area of control).

¹⁵⁶ 60 F. Supp. at 810.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 811. The soldier-state relationship has also been characterized as being that of an employer-employee. *Parker v. Levy*, 417 U.S. 733, 761 (1974).

Adding to the confusion is the fact that there is disagreement among legal writers over the advisability of labeling legal relationships as contractual, or quasi-contractual.¹⁵⁹ And there are those who view society as a movement of relationships from status to contract,¹⁶⁰ while others specifically reject that position.¹⁶¹ Recent domestic judicial posture seems to favor the consideration of most legal relationships as contractual or at least quasi-contractual. Where does the legal relationship we know as the "enlistment" fit and how should it be treated? These questions are met with mixed and conflicting responses. Some resolution of the conflicts may lie in a uniform or standard approach to the problem.¹⁶²

B. A UNIFORM APPROACH

The lack of consistency on the subject of enlistments should be apparent from the preceding sections. But, is the law of enlistments subject to consistency? Consider first the views of one writer on the matter:

The courts are constantly oscillating between a desire for certainty on the one hand and a desire for flexibility and conformity to present social standards upon the other. It is impossible that in a progressive society the law should be absolutely certain. It is equally impossible that the courts should render decisions conforming to the prevailing notions of equity without thereby causing a considerable degree of uncertainty, owing to the constant fluctuations in moral standards and their application to new and unforeseen conditions.¹⁶³

The illusive nature of "absolute certainty" should not act as a deterrent in any search for uniformity. The preceding sections confirm that a great deal of uniformity has been subordinated to "flexibility." The conflicting perspectives seem to stem from diverse applications of broad, well-settled principles of law. Unnecessary diversity arises when those broad principles are abandoned or when they are distinguished out of existence by attention to the individual facts of each case. One writer has stated:

¹⁵⁹ 60 F. Supp. at 81%.

¹⁶⁰ H. MAINE, *ANCIENT LAW* 170 (1st ed. 1861).

¹⁶¹ See *Hume v. Moore-McCormack Lines*, 121 F.2d 336, 343 nn. 19-22 (2d Cir. 1941).

¹⁶² See 3 R. POUND, *JURISPRUDENCE* 732-36 (1959). Pound's view is that our judicial system is approaching a condition where codification is likely to be resorted to. His position is based to some extent on five defects of form which exist in Anglo-American law: want of certainty; waste of labor entailed by the unwieldy form of the law; lack of knowledge on the part of those who amend it; irrationality, due to partial survival of obsolete precepts; and confusion. The same "defects" may be used as a basis for applying a standard approach to the law of enlistments.

¹⁶³ J. WU, *JURISPRUDENCE* 291 (1958).

Law, as St. Thomas Aquinas has pointed out, belongs to "practical reason," and deals with contingent matters, that is, with variables. This is why, however certain the basic principles of law may be, the more we descend to the details the less degree of certainty we find. In order to secure a practical certainty, which is necessary for social order and peace, there must be established some intermediary rules between universal principles and concrete cases. Such rules must needs deal with the average, and proceed in gross and on the whole. In order to reduce the infinite complexities of human affairs to some kind of order, the law must classify them into certain broad categories, and affix to each category some rules and measures more or less appropriate to it. For if there were as many rules or measures as there are things measured or ruled, they would cease to be of use, since their use consists in being applicable to many things.¹⁶⁴

One method of dealing with broad principles or general rules is to establish a common or uniform approach which employs those general rules. The term "uniform approach" is used to describe a standard application of criteria for measuring the validity and effect of any enlistment contract. In other words, the uniform approach is an attempt to establish a definite methodology for solving enlistment problems.

Any common approach would require consideration of the three factors which have contributed to the needless diversity:

- a. The lack of a common definition of the term "enlistment." The term is used interchangeably to refer to the act of becoming a soldier as well as to the completed act or status.
- b. Diverse opinions as to what rules or bodies of law govern the soldier-state relationship known as the "enlistment."
- c. The role of public policy in determining the validity of the "enlistment."

1. Recognition of a Common Definition: Contract, Status, or Both?

The term "enlistment" will continue to be a well-recognized method of describing the voluntary soldier-state relationship. However, its meaning is unclear and problems arise when the term "enlistment," through judicial or administrative actions, takes on diverse meanings. For example, it should not be used to describe the soldier-state relationship established by induction.

Some of the definitional inconsistencies can be attributed to the

¹⁶⁴ *Id.* at 289.

philosophy that a legal relationship is either a contract or a status, but never encompasses both concepts. However, the Supreme Court in *Grimley* did not hesitate to use both terms in defining the enlistment.¹⁶⁵ Although the Court explained how the terms could both be utilized, later decisions have attempted to further clarify the effect of the now famous *Grimley* definition:

Enlistment in the military service of the United States is a voluntary act establishing a contractual relationship. . . .

Respondent asserts that enlistment differs from normal contractual relationships in that the enlistee thereby changes his status from civilian to soldier. While this may indeed be the case, . . . this has no relevant effect on the basic rights of the parties here involved. The fact that the enlistee has changed his status means that he cannot through breach of the contract throw off this status. Rut change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld, under proper circumstances, by a court of law.¹⁶⁶

The change of status from citizen to soldier can be either voluntary or involuntary. When the change is effected by an agreement, contract, or compact with the Government, the effectuation of a new status is presumed to have been voluntary. In addition, the emergence of the new status cements the contract because of the extraordinary characteristics of the soldier-statti relationship. But the voluntary relation is still contractual in nature.

An examination of the enlistment agreement itself confirms this.¹⁶⁷ The parties may agree to length of service, assignments, training, compensation, date of entry, and promotions. These agreements may be indicated either on the enlistment agreement itself or in attached annexes. Physically, the entire enlistment

¹⁶⁵ 137 U.S. 147, 150-51 (1890). One writer has noted that although the concept; of contract and status are "protean and elusive," at the time of the *Grimley* decision, they were "mutually exclusive." See Casella, *Armed Forces Enlistment: The Use and Abuse of Contract*, 39 U. CHI. L. REV. 783, 785 n.14 (1972).

¹⁶⁶ Pfile v. Corcoran, 287 F. Supp. 554, 556-57 (D. Colo. 1968).

¹⁶⁷ Department of Defense Form 4 (1 June 1975) contains sections entitled "Agreements," "Benefits" and "Understandings." Although the language in each of these sections is couched in contractual terms, item 16 provides a glimpse of the type of terms that are used:

16. I hereby certify that I have read this agreement carefully; it has been fully explained to me, and I understand it and the conditions under which I am enlisting. I understand that ONLY those promises concerning assignment to duty, geographical area, training, or a particular school or special program; Government quarters; physical and other qualifications for assignment to a particular school, rating, or specialty; bonuses or other compensation; promotions; or transportation of aid support to dependents contained herein or recorded on the Annex(es) attached hereto, if any, will be honored and that any other promises not contained therein made by any person are not effective and will not be honored.

agreement often approximates a personal service contract.¹⁶⁸ The nature of the agreement has prompted at least one federal judge to say that not only is it a contract, but principles of equity require that some degree of mutuality is required even in a military enlistment contract.¹⁶⁹

It is the requirement of mutuality, or rather the lack of it, which renders the enlistment contract unique. However, the enlistment agreement does not appear so one-sided with the advent of enlistment options, increased pay and benefits, and the federal courts' posture of reviewing military status by habeas corpus.¹⁷⁰ If a defect arises in the execution of the agreement of service, the agreement may still become binding by virtue of the parties' conduct. An implied contract may result.¹⁷¹ In either case, the civilian acquires the status of a soldier.

The soldier's "status" may be compared with the common law position of public officers. They were considered to possess what has been characterized as "compulsory" status. Once they accepted the responsibilities of their offices, they were subject to mandamus until their resignations were accepted. The rationale for such a binding status was based on the view that the public should not suffer from the lack of public servants.¹⁷² That reasoning and the

¹⁶⁸ For contrast, consider the form of an early enlistment contract found in *Ex parte Brown*, 4 F. Cas. 325 (C.C.D.C. 1839) (No. 1,972).

I, William Brown, do acknowledge that I have voluntarily enlisted myself to serve four years in the marine corps of the United States, unless sooner discharged, upon the terms mentioned in the act passed the 11th day of July, 1798 [1 Stat. 594], entitled "An act for establishing and organizing a marine corps"; and also the act passed the 2d day of March, 1833 [4 Stat. 647], entitled "An act to improve the condition of the non-commissioned officers and privates of the army and marine corps of the United States, and to prevent desertion"; and that I have had read to me the rules and articles of the army and navy against mutiny and desertion.

Witness my hand this 7th day of January, 1835.

his

"William X Brown."

mark

Id.

¹⁶⁹ *Larionoff v. United States*, 365 F. Supp. 140 (D.D.C. 1975), *affd.* 533 F.2d 1167 (D.C. Cir. 1976), *affd.* 97 S. Ct. 2151 (1977). *See also* *Shelton v. Brunson*, 335 F. Supp. 186 (N.D. Tex. 1971), *affd in part, vacated in part*, 454 F.2d 737 (5th Cir. 1973) (Wisdom, J., dissenting) (if contract principles are to be applied, principles applicable to contracts of adhesion should be used).

¹⁷⁰ *See* Peck, *The Justices and the Generals: The Supreme Court and Judicial Review of Military Activities*, 70 MIL. L. REV. 1 (1975).

¹⁷¹ For a good discussion by the Court of Military Appeals on constructive enlistments (implied contracts) *see* *United States v. King*, 11 C.M.A. 19, 28 C.M.R. 243 (1959). *See also* U.S. DEP'T OF ARMY, PAMPHLET No. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK 3-45 (1973); note 51 *supra*.

¹⁷² *See* *Edwards v. United States*, 103 U.S. 471, 473-74 (1850). For further discussion of "status," *see* 4 R. POUND, JURISPRUDENCE 262-76 (1959).

Grimley rationale, which forbade the soldier from casting off his military status, seem to be of the same fabric.

The terms "contract" and "status" not being inconsistent for definitional purposes, the following definition would serve well:

Enlistment: The act of voluntarily agreeing to serve in an armed force as a servicemember for a fixed period of time. The agreement is usually effected by executing an enlistment contract. Execution of that document (1) places contractual obligations on both the Government and the volunteer, and (2) changes the volunteer's legal status from civilian to servicemember. Absent a valid formal enlistment contract, the parties may nonetheless by their actions accomplish the same end.

Any common definition should include consideration of both elements—contract and status. To ignore the importance of "status" relegates the enlistment agreement to a mere contract. To ignore the contractual element encourages a rigid and formulaic approach to the problem and elevates form over substance.

2. *Application of General Principles of Contract Law*

The proposed common definition recognizes the voluntary soldier-state relationship as being primarily contractual in nature.¹⁷³ Principles of contract law should be consulted first in determining (1) the validity of the enlistment contract at its inception and (2) the rights of the parties under the enlistment contract. For example, contract law should be applied if the issue concerns the jurisdiction of a court-martial or if a purely administrative determination is required.

Rather than applying the law of contracts of the place of execution of the enlistment contract, the approach should instead be federal in character—looking to sources such as federal case law or the *Restatement of Contracts*.¹⁷⁴ Pertinent statutes and regulations

¹⁷³ See, e.g., Op. Att'y Gen. 187, 190 (1853) (enlistments are contracts which ought to be construed according to general principles of contract law. *But* see *United States v. Standard Oil Co.*, 60 F. Supp. 807, 810 (S.D. Cal. 1945), where the court noted that the soldier-state relationship was primarily "legislative." One writer has proposed that the relationship should be viewed as governed partly by statute, partly by military regulation and partly by contract. Casella, *supra* note 165, at 807.

¹⁷⁴ *Colden v. Asmus*, 322 F. Supp. 1163, 1164 (S.D. Cal. 1971) (court will look to general principles of contract law, including law of federal contracts as interpreted in federal court decisions). See also *United States v. Standard Oil Co.*, 332 U.S. 301, 305 (1947), where the Supreme Court stated:

Perhaps no relation between the Government and a citizen is more distinctively federal in character than that between it and members of its armed forces. To whatever extent state law may apply to govern the relations between soldiers or others in the armed forces and persons

should be considered as indications of congressional and executive intent to declare persons eligible to enter into the enlistment contract. As such, they must be considered to be for the benefit of the Government unless specifically stated otherwise. Likewise, enlistment regulations should be considered procedural or directory in nature and should not invalidate an otherwise valid enlistment if not strictly followed. Unless specifically stated otherwise, they too should be presumed to be for the benefit only of the Government.¹⁷⁵

A great deal of inconsistency and inequity would be precluded by restricting the concept of "void" enlistments.¹⁷⁶ The concept connotes the complete absence of any legal relations when in fact a servicemember may have obtained "status" as a soldier notwithstanding defects in the enlistment contract.¹⁷⁷ It would be much simpler to label enlistment contracts either "voidable" or "valid." That would more closely comport with prevailing principles of contract law.¹⁷⁸ Questions of the validity of enlistment contracts entered into by minors and insane persons present special problems. They may be dealt with in a number of ways. First, they may continue to be considered void, with no legal force and effect for either civil or criminal aspects. Alternatively, they could be viewed as voidable at the option of the Government for civil and/or criminal purposes.¹⁷⁹

outside them or nonfederal governmental agencies. the scope, nature, legal incidents and consequences of the relation between persons in service and the Government are fundamentally derived from federal sources and governed by federal authority.

¹⁷⁵ The fallacy in declaring eligibility regulations to be for the benefit of the recruit lies in the fact that with a mixture of imagination and a little logic, any requirement could be construed to be for the benefit of the recruit. To avoid the problem, perhaps the Government should drastically simplify the regulatory requirements so that any "able-bodied citizen" may enlist. In all probability, that requirement would also be construed to be for the benefit of the "citizen." Another alternative would be to specify requirements for enlistment with express declarations as to which provisions were for the benefit of the Government. See Section VII *infra*.

¹⁷⁶ Enlistments should be labeled as "void" only where the governing statute or regulation expressly declares them to be "void." See *ETS-Hokin & Galvan, Inc. v. Maas Transport, Inc.*, 380 F.2d 238, 260 (8th Cir.), *cert. denied*, 389 U.S.977 (1967). The statutory requirements for enlistment have been viewed time and again as being directory in nature and current Army Regulations provide that the Secretary of the Army may approve a fraudulent enlistment otherwise invalid because of a "non-waivable" disqualification. See DAPC-PAS-S 2614002 Jun 75, SUBJ: Change to AR 635-200, para. 14-12(f).

¹⁷⁷ 1 A. CORBIN, CONTRACTS 12-17 (1963). See *also* note 133 *supra*.

¹⁷⁸ *Id.*

¹⁷⁹ See, e.g., *Paulson v. McMillan*, 8 Wash. 2d 295, 299-300, 111 P.2d 983, 985 (1941). See *also* note 212 and accompanying text *infra*.

Historically, these two categories have received special treatment because they both raise questions concerning "competence" to enter into contractual relations.¹⁸⁰ If an individual is of age and of sound mind, then failure to meet qualifications (such as citizenship or absence of felony convictions) should render the contract voidable.¹⁸¹ The same should hold true for similar regulatory qualifications. To consider all statutory and regulatory qualifications as measures of "competence" only dilutes and confuses the issue. Characterizing such contracts as "voidable" would allow the Government the necessary ability to release unqualified soldiers and permit personnel to avoid some of the inequities which result from summarily declaring periods of prior service to be void. Although the enlistment agreement may be defective, the resulting service is often honorable and rendered in good faith.

3. *Balance of Interests*

Implicit in almost all enlistment cases is a balancing of the interests of the parties involved. It is this balancing which provides the needed flexibility in determining the validity of the enlistment contract and the subsequent obligations and rights of the parties to that agreement.¹⁸² In any case the interests to be considered are:

- (a) The servicemember's interest.
- (b) The Government's interests.
- (c) The public's interests.

We turn first to the interests of the servicemember, the individual who has volunteered his service to the Government. The servicemember's interests are personal in nature. Although he may have enlisted because of a sense of patriotic duty, he is still interested in receiving promised benefits which translate into financial security. For instance, the servicemember does live a somewhat restricted lifestyle. The environment subjects him to higher requirements of discipline, and he is subject to punishment for actions considered by his civilian counterparts as harmless.¹⁸³ When an in-

¹⁸⁰ See, e.g., *United States v. Robson*, 24 C.M.R. 375 (A.B.R. 1957), where a twenty-year old alien was presumed "competent" to enlist.

¹⁸¹ See note 136 *supra*.

¹⁸² Implementing a standard treatment for a problem does not necessarily lead to an inflexible treatment. In this instance it cannot, because the proposed balance of interests test includes consideration of the public's interest—public policy. Such consideration provides some flexibility.

¹⁸³ Despite continued reforms in military justice, many writers cling to obsolete visions of soldiers serving in involuntary servitude without any constitutional

dividual agrees to serve as a soldier he may exercise one of several enlistment options.¹⁸⁴ He can expect that the Government will stand behind its promises of special training or assignments.¹⁸⁵ He can expect that his constitutional rights will not be disregarded and he will discover that numerous judicial and administrative safeguards have been incorporated into the system for his benefit.¹⁸⁶ In return for his honorable service he can also expect promised remuneration in the form of pay, promotion, and benefits.¹⁸⁷

The government's interests, on the other hand, lie chiefly in fulfilling its mission of maintaining an armed force fully capable of meeting national needs as they arise. An element of meeting this mission is the requirement for discipline. Because it is the Government which plays the role of employer in the soldier-state relationship, the Government determines whom it will employ. In the same manner, it is the Government which decides if the soldier-state relationship will be continued or dissolved. The government's interests are paramount but not always absolute. They stand with the enlistment contract itself in the shadow of the Constitution.¹⁸⁸

When the validity of the enlistment contract is questioned, the delicate balance of the two competing interests is often tipped when a third interest, the public's interest, is considered.¹⁸⁹ The public's interest is usually expressed in terms of public policy: "a very unruly horse . . . once you get astride it you never know where it will carry you." ¹⁹⁰

safeguards. *See* Casella, *supra* note 165, at 799. *See also* Raderman v. Kaine, 411 F.2d 1102 (2d Cir. 1969); Smith v. Reasor, 406 F.2d 141 (2d Cir. 1969); Krill v. Bauer, 314 F. Supp. 965 (E.D. Wis. 1970). The recent decision in Parker v. Levy, 417 U.S. 733 (1974), however, shows an awareness by the Supreme Court of the "fairness" of the military judicial system. That decision recognizes the uniqueness of the military system. Thus, we see another argument for distinguishing military enlistment contracts from purely private employment contracts.

¹⁸⁴ The ability of the recruit to take advantage of the options may be dependent on meeting qualifications, especially where the option requires specialized training. Army Reg. No. 601-210 contains the thirteen primary enlistment options.

¹⁸⁵ *See, e.g.*, Johnson v. Chafee, 469 F.2d 1216 (9th Cir. 1972); Bemis v. Whalen, 341 F. Supp. 1289 (S.D. Cal. 1972); DAJA-AL 197615074, 6 Aug. 1976; DAJA-AL 197514380, 16 July 1975.

¹⁸⁶ *See, e.g.*, United States v. Burton, 21 C.M.A. 112, 44 C.M.R. 166 (1971) (90-day speedy trial rule).

¹⁸⁷ *See* Bell v. United States, 366 U.S. 393 (1961) (statutory right to accrued pay).

¹⁸⁸ The Government must accord due process to the servicemember if he is to be discharged from the service. *See* Allgood v. Kenan, 470 F.2d 1071 (9th Cir. 1972); Silverthorne v. Laird, 460 F.2d 1175 (5th Cir. 1972).

¹⁸⁹ The third interest may not always be the "public" interest as such. The interest of a parent of a minor enlistee might tip the balance. It certainly did so in earlier cases where the right of the parent to the custody of a minor enlistee was considered paramount absent pending court-martial charges.

¹⁹⁰ J. WU, JURISPRUDENCE 143 (1968).

Public policy is considered to be an implementation of the common good. When applied to the area of contracts the following is apropos:

The law looks with favor upon the making of contracts between competent parties upon valid consideration and for lawful purposes. Public policy has its place in the law of contracts,— yet that will-o'-the-wisp of the law varies and changes with the interests, habits, needs, sentiments and fashions of the day, and courts are adverse to holding contracts unenforceable on the ground of public policy unless their illegality is clear and certain.

This raises a question for the student of Jurisprudence as to whether that which the law looks upon with favor is not the result of a stronger policy of law. In fact, Sir George Jeesele, M.R., explicitly appealed to public policy in support of the freedom of contract: "If there is one thing which more than another public policy requires it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice: Therefore, you have this paramount public policy to consider in that you are not lightly to interfere with this freedom of contract."¹⁹¹

In addition to the careful consideration of the servicemember's and government's interests, the public has an interest in the "institution" of the soldier-state relationship.¹⁹² Thus we see the comparison of the enlistment to marriage and citizenship. These relationships have traditionally been considered special because it is in the public's best interest that they be maintained and not easily dissolved. The public's best interest requires that once bound by a contract with the Government, the servicemember may not at his pleasure reject the agreement which binds him. Consider the position of a court faced with the question of the validity of a minority enlistment:

It is not reasonable that a minor, of age to enlist, who secures the honorable and responsible position of a soldier in the United States army, could abandon his colors in the face of the enemy and on the eve of battle, and avoid trial and punishment for desertion by the intervention of his parents, who had not consented to his enlistment, but who had taken no step to avoid it before the soldier's arrest for desertion; or that he could endanger the army by betraying its secrets to the enemy, and not be amenable to military jurisdiction. his parents objecting. We cannot approve a view that leads to such results.¹⁹³

The balance of interests provides flexibility to the uniform ap-

¹⁹¹ *Id.* at 144.

¹⁹² *United States v. Standard Oil Co.*, 60 F. Supp. at 811

¹⁹³ *In re Miller*, 114 F. 838 (5th Cir. 1902).

proach. Flexibility can lead to foot-loose application of both the definition of enlistment and the applicable law. And it can lead to inconsistency. Nonetheless, the risk is reasonable. The interests should be balanced. The Supreme Court in *United States v. Grimley* considered it to be against public policy to allow a deserter to avoid his responsibilities by deceiving the Government and then pleading his disability as a bar to court-martial jurisdiction. Public policy required paramount consideration of the government's interests.

Regarding the role of public policy in determining the validity of enlistments, Winthrop wrote:

That the United States should be held to be precluded from ratifying an irregular enlistment where the disqualification did not impair, or had ceased to impair, the value of the soldier, who meanwhile had performed service, received pay, etc.; or where the soldier had committed a military offense and his trial by court-martial and punishment were called for by the interests of discipline—*would be an unfortunate contingency and against public policy.*¹⁹⁴

The Court of Military Appeals, however, ignored the foregoing considerations and held it to be against public policy to sustain court-martial jurisdiction over a servicemember who had fraudulently enlisted with the aid of a recruiter.¹⁹⁵ Public policy, according to the court, required paramount consideration of the servicemember's interests notwithstanding his criminal conduct. Both the Supreme Court and the Court of Military Appeals applied what they perceived to be the "public policy." Both rode the "unruly horse."¹⁹⁶

C. APPLICATION OF THE UNIFORM APPROACH: GENERAL CONSIDERATIONS

The uniform approach is not a simplistic application of rules of contract law to enlistments. It fully recognizes the importance of the change of "status" and the competing interests involved. The utility of the approach is seen in its application. Uniform or stand-

¹⁹⁴ W. WINTHROP, *supra* note 94, at 545–46 (emphasis added). Arguably, Winthrop was noting two separate grounds for Government ratification of an irregular enlistment. The one is constructive enlistment. The other is commission of an offense.

¹⁹⁵ *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975). See notes 120–126 and accompanying text *supra*.

¹⁹⁶ See note 190 *supra*.

ard tests do not guarantee uniform results, but an accepted uniform approach will promise a degree of predictability and will cut through the needlessly diverse treatment of enlistment problems. Consider the following in the application of the uniform approach.

1. *Formation of the Enlistment Contract*

The initial inquiry should be: Have the parties to the enlistment contract satisfied the elements required for the formation of a valid and binding agreement? The prerequisites for the formation of a simple contract are (1) mutual assent, (2) consideration, (3) two or more parties having at least limited capacity, and (4) the agreement must not be one declared void by statute or by rule of common law.¹⁹⁷ If these requirements are met, the enlistment contract is valid and binding for all purposes. If any of the requirements is not satisfied, the agreement may still be found binding on the equitable theory of implied contract—the constructive enlistment.¹⁹⁸ Despite some commentators' position that the constructive enlistment is no longer viable,¹⁹⁹ the concept is well-founded and should remain a useful method of curing defects in the enlistment contract.

Because the enlistment contract is a contract which changes status, even serious defects should not invalidate the agreement. Unless a statute clearly restricts the capacity of a citizen to enter into an armed forces enlistment contract, defects resulting from the implementing regulations should only render the enlistment contract voidable. The interests of the public favor preservation of the agreement.²⁰⁰

Likewise, misfeasance or malfeasance on the part of the recruiter should not automatically void the enlistment contract. The recruiter, under prevailing rules of contract and agency law, is an agent for the principal, the United States Government.²⁰¹ The unauthorized acts of the agent are outside his actual authority and are not binding upon the Government. However, the latter should be able to ratify the agreement if it so chooses. It may decide to do so in a case where the servicemember is singularly distinguished in his

¹⁹⁷ L. SIMPSON, *CONTRACTS* § 8 (2d ed. 1965).

¹⁹⁸ See notes 130 & 171 *supra*.

¹⁹⁹ See note 130 *supra*.

²⁰⁰ The argument for preserving the agreement in time of war is especially strong and the argument remains persuasive during peacetime. The military is required to maintain a ready armed force. Unless courts are capable of predicting periods of peace or war, enlistments should be treated as if the armed force is engaged in wartime activities.

²⁰¹ See *Shelton v. Brunson*, 465 F.2d 144 (5th Cir. 1972).

service, and it should certainly be able to ratify the agreement where serious charges have been preferred against a servicemember.²⁰² In that case, even equity should not intervene in the criminal proceeding.²⁰³ Once again, the interests of the public and the Government outweigh the interests of the servicemember who is pending trial.²⁰⁴

Public policy requires that if the servicemember has committed an offense, he should be tried, notwithstanding a defective enlistment. If a recruiter acted improperly in recruiting him, he too should be subject to disciplinary action.²⁰⁵ To void the enlistment contract would, as Winthrop noted, violate public policy.²⁰⁶

2. *Performance of the Enlistment Contract*

The enlistment contract may delineate specific responsibilities of the parties.²⁰⁷ Specific remedies usually are not indicated. For the most part, both the responsibilities and the remedies are found in the numerous regulations which now govern almost every aspect of military life. If either party fails to fulfill its responsibilities, the injured party may attempt to avoid the agreement on a breach of contract theory.²⁰⁸ As discussed in preceding sections, both the fed-

²⁰² See note 221 and accompanying text *infra*.

²⁰³ "The maxim that equity will not enjoin a criminal prosecution summarizes centuries of weighty experiences in Anglo-American law." *Stefanelli v. Minard*, 342 U.S. 117, 120 (1951).

²⁰⁴ See note 194 and accompanying text *supra*. Historically, civil courts have granted no relief to accused servicemembers serving under illegal contracts of enlistment as long as they are undergoing military trial or discipline. See *In re Robert*, 2 Hall Law 192 (Pa. 1809); *Grace v. Wilber*, 12 Johns (N.Y.) 68, where the court stated:

The contract [of enlistment] may be void and he may be entitled to his discharge; but it does not follow that he is to be his own judge, and to discharge himself by desertion. Any person detained by military authority or military force may obtain his discharge, if he is entitled to it, by application to the proper civil authorities, but a soldier in actual service cannot be allowed to desert at pleasure.

Cited in *United States v. Julian*, 43 C.M.R. 876, 878 (N.C.M.R. 1971). See notes 45 & 113-116 and accompanying text *supra*.

²⁰⁵ The recruiter may be punished administratively or under the provisions of the UNIFORM CODE OF MILITARY JUSTICE arts. 84 & 92, 10 U.S.C. 884 & 892 (1970).

²⁰⁶ See W. WINTHROP, *supra* note 94, at 545-46.

²⁰⁷ See Dep't of Defense Form 4 (1 June 1975).

²⁰⁸ But see *Benway v. Barnhill*, 300 F. Supp. 483 (D.R.I. 1969) where the Government unsuccessfully argued that a conscientious objector could not be discharged because he had a binding and enforceable contract with the Government. See also *McCullough v. Seamans*, 348 F. Supp. 511 (E.D. Cal. 1972) where the Government failed in its attempt, on cross-claims, to collect costs for educating Air Force Academy graduates who later were discharged as conscientious objectors. The Government had relied on common law contract principles of rescission and unjust enrichment. Under principles of contract law, the equitable remedy of

eral courts and the Army's Judge Advocate General are disposed to set aside contracts where a "material breach" has occurred.²⁰⁹

Voiding the enlistment contract for any lesser defect would emasculate the importance of the element of "change of status." The language from *United States v. Grimley* that no breach may destroy the status created by the enlistment contract does not deter the orderly rescission of an enlistment contract. The unique nature of the enlistment, the change of status, should be preserved and should be considered carefully before an enlistment contract is declared null and void.²¹⁰

It is in the area of performance of the enlistment contract that delineation between the concepts of status and contract must be clear. The "enlistment contract" gives rise to the "status." The parties' conduct during the "status" is controlled to some extent by the terms of the enlistment contract. For example, the parties may agree to the length of the status and may also agree on the so-called enlistment options. But, the nature of the soldier-state relationship demands that statutes, regulations, or special circumstances may also control the "status" and may override terms of the enlistment contract.²¹¹ Pending court-martial charges may require extension of

rescission is available if plaintiff is willing to make restitution. *Matzell v. Platt*, 332 F. Supp. 1010 (E.D. Va. 1971).

²⁰⁹ See notes 137 & 141 *supra*. It has been suggested that the law of contracts should be applied only where the servicemember is alleging a breach of contract as to his enlistment option(s). See Casella, *supra* note 165.

²¹⁰ One writer, in analyzing the contractual aspects of the enlistment, has noted that:

The use of contract law will also further due process and general fairness by giving notice to the volunteer of all possible contingencies. In order for the enlistment to be legitimately termed a "contract," these prerequisites must be met, and the unfortunate characterization of enlistment as being a change in status will be banished forever in the catacombs of sovereign supremacy.

Dilloff, *A Contractual Analysis of the Military Enlistment*, 8 U. RICH. L. REV. 121, 149 (1974).

The "change of status" concept should not be banished. It is idealistic to conceive that an enlistment contract will advise the volunteer of all possible contingencies. General clauses will suffice. To disregard the concept of the change of status ignores the unique nature of the soldier-state relationship. That uniqueness was recently recognized and approved by the Supreme Court in *Parker v. Levy*, 417 U.S. 733 (1974). For now, the military represents a distinct society governed by its own rules and regulations. To pass from the civilian sphere into the military is certainly a change of status.

²¹¹ See, *Rehart v. Clark*, 448 F.2d 170, 173 (9th Cir. 1971) (existing statutes and regulations are read into the enlistment contract); *accord*, *Schulz v. Reasor*, 332 F. Supp. 708, 711 (E.D. Wis. 1971); *Goldstein v. Clifford*, 290 F. Supp. 275, 279 (D.N.J. 1968).

When the servicemember enlists, he states that he understands that:

the status, even though the enlistment contract provides for a fixed term of service.²¹² Modification of the terms of military service, however, does not make the enlistment contract any less a contract.

D. SPECIFIC ENLISTMENT PROBLEMS

In the preceding subsections, the three-step uniform approach and general considerations in its application were examined. Here, the inquiry will center on application of the uniform approach to several specific, frequently encountered enlistment problems. Graphically, the application of the uniform approach can be pre-

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- (1) In time of war or national emergency, or when otherwise authorized by law, I shall be required to serve as ordered by competent authorities, notwithstanding the provisions of any Annex(es) attached hereto or any other promises made to me in connection with my enlistment (reenlistment).
 - (2) Statutes and regulations applicable to personnel in the Armed Forces of the United States may change without notice to me and that such changes may affect my status, compensation, or obligations as a member of the Armed Forces, the provisions of this enlistment agreement to the contrary notwithstanding; and
 - (3) An enlistment in the Regular Army, Regular Navy, Regular Air Force, Regular Marine Corps, or Regular Coast Guard in effect at the beginning of a war or entered into during a war continues in effect, unless sooner terminated by the President, until six months after the termination of that war.

See DD Form 4, Enlistment Agreement, Part IV.

²¹² The mere expiration of a servicemember's term of service does not automatically terminate his military status. See *Messina v. Commanding Officer*, 342 F. Supp. 1330 (S.D. Cal. 1972); *Taylor v. Reasor*, 19 C.M.A. 405, 42 C.M.R. 7 (1970); *United States v. Hout*, 19 C.M.A. 299, 41 C.M.R. 299 (1970). Such extensions of military status are controlled by *MANUAL FOR COURTS-MARTIAL, UNITED STATES*, 1969 (Rev. ed.), para. 11d and AR 635-200, para. 2-40 (Interim change, 4 Apr. 77) which now provides:

A member may be retained beyond the expiration of his term of service when an investigation of his conduct has been initiated with a view to trial by court-martial: charges have been preferred; or the member has been apprehended, arrested, confined or otherwise restrained by the appropriate military authority. However, if charges have not been preferred, the member shall not be retained more than 30 days beyond the expiration of his term of service without the personal approval of the general court-martial convening authority concerned.

Failure of the Government to comply with similar controls resulted in the reversal of a court-martial conviction in *United States v. Walck*, 54 C.M.R. Adv. Sh. 308 (A.C.M.R. 1975) (The predecessor to the above provision required approving action by the convening authority, or his designee, even though other actions to bring the accused to trial had commenced). The Secretary of the Army subsequently changed the provision into its present form. See *Criminal Law Section, THE ARMY LAWYER*, Feb. 1977, at 19. The earlier provision was also the subject of judicial review in *United States v. Torres*, 3 M.J. 659 (A.C.M.R. 28 Apr. 1977) (en banc), where the court overruled *Walck* insofar as it held (1) that failure of the Government to comply with its own regulations divests the court of jurisdiction to try the accused, and (2) that the sole remedy is dismissal of the charges. The majority opinion noted that the convening authority had in effect complied with the requirement to give necessary approval for retention where he referred the accused's case to trial. The court noted:

We further find no reason to penalize the Government in this case to insure compliance with the regulation in the future. Noncompliance is not in and of itself a violation of a basic constitu-

sented in a decision flow chart.²¹³ Three situations in which the questionable validity and effect of enlistments commonly arise are:

- a. During his court-martial, the accused servicemember alleges that his enlistment contract is invalid and he is therefore not subject to the court-martial's jurisdiction.
- b. A servicemember, not under pending charges, seeks an administrative discharge on the grounds that his enlistment contract was entered illegally.
- c. A servicemember argues that when he enlisted, he was specifically promised training in a specialty area, and an accelerated promotion upon completion of that training. He states that he has received neither and argues breach of his enlistment contract.

The first two situations fall within the area of formation of con-

tional right so as to require such a drastic measure as dismissal of the charges. Accordingly, we hold that each case must be examined for prejudice to the accused in determining what remedy to apply when the Government fails to comply with its own regulation. Finding no prejudice here, there is no relief to be given.

3 M.J. at 663 (emphasis added).

In his dissenting opinion, Judge Cook stated that permitting the Government to go to trial in spite of the fact that it had violated its own regulation nullifies the rule that the Government is bound by its own regulations. In his view, the Government was estopped to contend that the accused remained subject to court-martial jurisdiction.

The reasons and requirements for exercising criminal jurisdiction over those persons awaiting a discharge were set forth in a concurring opinion by Judge Costello.

1. To maintain integrity of the military force as by inhibiting soldiers from walking off an active battlefield on the day their enlistments nominally expire.
2. To provide order and regularity during the delay incident to the muster-out of troops after the need for massive mobilization has passed.
3. To prevent fortuitous cleansing of the slate by the routine discharge of those who deserve both to be called to account and to be barred from reenlistment.
4. To foster disciplined conduct by individuals in the final few days or hours of service.
5. To provide a legal status and basis for payment and management of such persons.

See generally AR 635-200, ch. 2, for examples of extensions (voluntary and involuntary) of terms of enlistment agreements. *Sue niso* United States v. Downs, 3 C.M.A. 90, 11 C.M.R. 90 (1953) where the period of military status was extended while the soldier received hospital treatment. Likewise, it is possible to effect a "constructive discharge" when both parties by their actions, or inactions, make it clear that they acquiesce in a "discharge status." United States v. Santiago, 1 C.M.R. 365 (A.B.R. 1951) (accused's confinement by the Army after a discharge did not constitute service which would effectuate a constructive enlistment). See DAJA-AL 1976/5049, 3 Aug. 1976.

²¹³ See Appendix A.

tracts. The third would be considered a contract performance question.

First, as to the court-martial jurisdiction problem: Is there a valid contract under governing rules of contract law? This step requires close consideration of the contract as a whole and the conduct of the parties in executing the agreement. If the answer is "yes," valid *de jure* status follows and the court-martial has jurisdiction. If the answer is "no," the inquiry continues.

Although there is not a valid formal contract, is there an implied contract under principles of contract law which gives rise to a constructive enlistment? If not, there is no jurisdiction absent an alternate basis for jurisdiction.²¹⁴ If there is a constructive enlistment, the balancing test is employed to determine if there are any reasons which preclude jurisdiction. For example, under the current rationale used by the Court of Military Appeals, equity prevents the Government from relying on a constructive enlistment where a recruiter's malfeasance has resulted in an invalid enlistment contract.²¹⁵ If the balance, however, swings in favor of the Government, jurisdiction would be present.²¹⁶

In the second case, the issue is once again the validity of the enlistment contract at its formation. The question arises, however, in an administrative setting and again the initial inquiry is whether a valid, formal contract was entered into in accordance with general principles of contract law. If so, the servicemember is not entitled to a discharge on the grounds of an invalid enlistment contract. If there is not a valid formal enlistment agreement and no constructive enlistment has arisen, a balance of interests test is employed to determine if there is any just reason for retaining the servicemember.²¹⁷

²¹⁴ A proposed statutory change would provide an alternate basis for court-martial jurisdiction. See Section VII. *infra*. Even absent a statute, the rationale for basing jurisdiction on "de facto" status may be sufficient. See *United States v. Julian*, 45 C.M.R. 876 (N.C.M.R. 1971); notes 114-116 and accompanying text *supra*. If the individual is not amenable to court-martial as a servicemember, he may still be subject to court-martial under provisions which provide court-martial jurisdiction over civilians. See UNIFORM CODE OF MILITARY JUSTICE arts. 2(10) & 18, 10 U.S.C. §§ 802(10) & 818 (1970).

²¹⁵ *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975). See notes 120-126 and accompanying text *supra*.

²¹⁶ See note 194 and accompanying text *supra*.

²¹⁷ A variation of this problem might be simply stated as follows: An individual under the minimum statutory age enlists and honorably completes a two-year tour before reaching that minimum age. He later reenlists and upon completing a total of twenty years' service seeks a discharge and retirement benefits. He learns that the original two-year enlistment is considered "void" and that he owes the Gov-

Analysis of the third case, involving a breach of the enlistment contract, follows the method used in the first two situations. The initial inquiry is whether there is a valid formal contract, or a substitute therefore, under general principles of contract law. If so, has a "material breach" occurred? If the answer is "no," there is no remedy. But, if the answer is "yes," a balance of interests test is used to decide if there are any just reasons for the material breach, such as a national emergency.²¹⁸

The above methodology has been somewhat simplified. There are, of course, at each level of inquiry, related and detailed inquiries. In each problem, it is important that the enlistment contract be viewed from its four corners before applying any balancing tests. All too often, courts have applied the balancing tests, determined the outcome and then applied those general principles which support the conclusion. Such a reverse application tends to ignore careful examination of the definition and nature of an "enlistment" and the enlistment contract in question.

VII. PROPOSALS FOR IMPLEMENTATION OF THE UNIFORM APPROACH

Aside from judicial recognition of a uniform methodology, specific steps can be taken to clarify the law and reduce some of the inconsistencies in this area.²¹⁹

A. AMENDMENT OF THE UNIFORM CODE OF MILITARY JUSTICE

The Uniform Code of Military Justice should be amended to provide for court-martial jurisdiction over individuals who may be serving under so-called "void" enlistments.²²⁰ The basis for such an amendment is well-founded. Despite recent decisions by the Court of Military Appeals, the long-standing and overwhelming weight of

ernment two more years of service before he will be eligible for retirement. Is the result equitable? What public policy is being furthered in such a case? If the individual had committed an offense while serving in the original "void" enlistment what public policy would have been violated by considering him amenable to court-martial jurisdiction. If an enlistment is to be declared valid (or at least voidable) for one purpose (civil aspect of recognizing honorable service) then it should also be declared valid for purposes of court-martial jurisdiction.

²¹⁸ See notes 66-69 & 138 *supra*.

²¹⁹ Appropriate sections of Title 10, United States Code, and Army Reg. 601-210, Regular Army Enlistment Program (15 Jan. 1976) should also be amended to reflect a workable definition of the terms "enlistment" and/or "enlistment contract."

²²⁰ See notes 176-179 and accompanying text *supra*.

authority requires that a servicemember pending court-martial charges may not use his invalid enlistment as a shield against prosecution.²²¹

Jurisdiction would, in effect, be based upon a statutory recognition of the "constructive enlistment." The constructive enlistment (implied contract) amendment would require that the parties had at some point intended that the accused enter into the soldier-state relationship. The recognized criteria would apply: (1) voluntary submission to military authority, (2) performance of military duties, (3) receipt of pay and allowances, and (4) acceptance of the services by the Government.²²² Recruiter misconduct would not, by itself, nullify jurisdiction unless such misconduct amounted to coercion or duress to enlist, and the servicemember never voluntarily submitted to military authority:²²³

Article 3, Uniform Code of Military Justice should be amended by adding the following provision:

- (d) Persons who are charged with committing an offense punishable by this chapter are amenable to court-martial jurisdiction notwithstanding the absence, for any reason, of a valid, formal enlistment agreement if
 - (1) They voluntarily submitted to military authority,
 - (2) They performed military duties,
 - (3) They received pay and allowances, and
 - (4) The Government accepted the services rendered.

The Government's lack of knowledge of the invalid formal enlistment agreement will not relieve the person of amenability to jurisdiction.

²²¹ See, *e.g.*, note 194 *supra*. Allowing an accused to so shield himself amounts in most cases to a grant of immunity. If the military is unable to prosecute the case, there is usually little, if any, interest on the part of federal or state authorities to further burden their judicial systems. This is especially true for the military offenses (desertion, AWOL, disrespect, *etc.*) which are of little concern to the civilian community but which nevertheless have a direct and debilitating effect on the military community.

²²² U.S. DEPT OF ARMY, PAMPHLET NO. 27-21, MILITARY ADMINISTRATIVE LAW HANDBOOK 3-45 (1973). The four criteria are a compilation drawn from numerous opinions, both federal and military, which have discussed constructive enlistments.

²²³ A servicemember who was coerced into enlisting may still effect a constructive enlistment if he voluntarily performs military duties after the coercive influence, if any, is removed. *United States v. Catlow*, 23 C.M.A. 142, 146, 48 C.M.R. 758, 762 (1974). See also *United States v. Barksdale*, 50 C.M.R. 430 (N.C.M.R. 1975). However according to *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975), any recruiter misconduct in conjunction with the coercion voids the enlistment and estops the Government from showing a constructive enlistment.

This provision should have no difficulty passing constitutional muster. It does not provide for jurisdiction over civilians.²²⁴ Rather it is proposed as a method of overcoming the "estoppel" theory relied upon by the Court of Military Appeals.²²⁵ The amendment permits, indeed, requires, the Government to prove military status. This statutory change would simply codify the long-standing rule that invalid enlistments could be cured by a "constructive enlistment."²²⁶ It should not be viewed as legislative condonation of recruiter nialfeasance.

A broader basis for jurisdiction might be founded on a *de facto* status theory. Satisfaction of the four constructive enlistment criteria would not be required to establish court-martial jurisdiction. Public policy would favor this basis only if strict limitations were placed upon its use. For instance, jurisdiction could be established only in those cases where the accused was pending charges punishable by a stated minimum punishment such as confinement at hard labor for one year. Another limitation might consist of restricting the *de facto* basis of jurisdiction to overseas war-time situations:

Article 3, Uniform Code of Military Justice could be amended to provide that:

- (e) In time of war, persons located overseas, not serving under a valid formal enlistment agreement nor satisfying the requirements of Article 3(d) of this chapter, may be amenable to court-martial jurisdiction if they have voluntarily represented themselves to be members of the armed forces and the Government has relied upon that representation.

This provision finds little direct support in military or federal opinions. To date, no opinion clearly equates or distinguishes the concept of "constructive enlistment" and *de facto* status. A few opinions suggest that "equivalent acts" of military service may con-

²²⁴ The Supreme Court has forbidden the military to exercise court-martial jurisdiction over civilians. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955) (no court-martial jurisdiction over discharged soldier for offenses committed while on active duty); *Reid v. Covert*, 354 U.S. 1 (1957) (no jurisdiction over civilian dependents accompanying armed forces overseas in peacetime); *Kinsella v. Singleton*, 361 U.S. 234 (1960) (expanded *Reid* to prohibit jurisdiction over civilian dependents in time of peace regardless of whether offense was non-capital or capital); *Grisham v. Hagan*, 361 U.S. 278 (1960) (no jurisdiction over civilian employees accused of committing noncapital offenses in peacetime).

²²⁵ See, e.g., note 119 accompanying text *supra*.

²²⁶ A similar provision could be incorporated into the enlistment provision of 10 U.S.C. §§ 504-505 (Supp. VI 1976).

stitute a valid change of status.²²⁷ Arguments against such a provision rest on judicial reluctance to expand court-martial jurisdiction, especially over "civilians." However, the individuals falling within this provision would not be civilians in the truest sense of the term. The amendment contemplates that the individuals would have voluntarily recognized their military status and used it to their advantage. Adoption of the proposed amendment would alleviate the troublesome jurisdictional loophole left by *Unifes States v. King* where the accused, previously discharged, forged documents authorizing his movement as a soldier to Europe. The Court of Military Appeals, finding no enlistment contract and no "meeting of the minds" labeled King an interloper and found no court-martial jurisdiction over him.

Adoption of a broader base of jurisdiction would considerably re-

²²⁷ There is a distinction between the two theories. The constructive enlistment theory has been traditionally based upon an "implied contract" rationale. The four recognized criteria are usually the criteria used by courts in upholding an otherwise invalid contract. See note 222 and accompanying text *supra*. A good discussion of constructive enlistments can be found in *United States v. King*, 11 C.M.A. 19, 28 C.M.R. 243 (1959) where the accused had falsified orders and posed as a serviceman. The Court of Military Appeals held that criminal activity could not effect an enlistment. The accused was an interloper and there had been no meeting of the minds. There had been no attempt to effect an enlistment.

The "de facto status" theory should be broad enough to encompass even interlopers. Although one of the elements of an implied or constructive enlistment may be missing, the servicemember may nonetheless have satisfied the requirement of "actual service." See *United States v. Julian*, 45 C.M.R. 876 (N.C.M.R. 1971). This theory cuts right to the heart of court-martial jurisdiction without pausing to ponder the legal effects of an invalid enlistment contract. If a competent accused is serving as a uniformed servicemember and commits a crime, any claim he may have of casting off his status should be stayed pending disposition of his court-martial.

Whether the de facto status theory requires some attempt to form an enlistment contract is not clear. One case equates constructive enlistment to de facto enlistments and also speaks in terms of acquiring the status of a soldier by acts which "are the equivalent of an enlistment." See *United States v. Fant*, 25 C.M.R. 643, 646 (A.B.R. 1958). A reading of *Julian*, *supra*, indicates that the "equivalent acts" theory is probably really the de facto theory—the existence of an attempted enlistment contract is not required. Subsequent acts in themselves constitute a valid change of status. See also *Ex parte Hubbard*, 182 F. 76, 81 (D. Mass. 1910); *Barret v. Looney*, 158 F. Supp. 224 (D. Kan. 1957), *aff'd*, 252 F.2d 588 (10th Cir. 1958), *cert. denied*, 357 U.S. 940 (1958); *In re McVey*, 23 F. 878, 879 (D. Cal. 1855) (petitioner was a de facto soldier because (1) he voluntarily assumed obligations and (2) he had attempted to secure the rights of an enlisted man). But see *Jackson v. United States*, 551 F.2d 282 (Ct. Cl. 1977), where the court stated in dicta that 10 U.S.C. § 505 (1970) required written instruments for enlistment, "otherwise there would be no way the government could determine which branch of the service was involved nor the term or conditions of the enlistment." 551 F.2d at 285.

duce the inconsistencies between the federal and military courts.²²⁸

Both theories incorporate a balance of interests test. Where the servicemember has committed a crime, his interests are outweighed by the interests of the Government and the public.

B. AMENDMENT OF ARMY REGULATION 635-200 PERSONNEL SEPARATIONS- ENLISTED PERSONNEL

The uniform approach could also be implemented in changes to personnel regulations which prescribe procedures for processing fraudulent or irregular entry cases. Specifically, Army Regulation 635-200, Chapter 14,²²⁹ should be amended to reflect the following:

- (1) An enlistment is a contract which changes status. Although the servicemember may have entered the service in a fraudulent manner, the subsequent conduct of the parties may have formed an implied contract.
- (2) All cases should be referred to a board of officers for disposition. The board should, upon the advice of the Staff Judge Advocate:
 - (a) examine the enlistment contract and its annexes;
 - (b) consider all available evidence and, according to general principles of contract law, determine if an implied contract has been formed;²³⁰ and
 - (c) balance the interests of the servicemember, the Government, and the public. Factors to be considered are: (i) the basis for disqualification; (ii) na-

²²⁸ The statutory basis might arguably extend in war time to inductees serving under an invalid induction order. Although the element of voluntariness would probably be missing, the needs of the war-time Army vastly outweigh the inductee's right to avoid court-martial jurisdiction on what usually amounts to the argument that the Government failed to follow its regulations. The intent here is to fill jurisdictional gaps for those who in some manner "volunteer" their services and commit an offense.

²²⁹ The purpose of proposed changes to the personnel regulations is to recognize that fraudulent enlistments should be viewed as voidable at the option of the Government. Chapter 14 is only one area of proposed change. Appropriate amendments would have to be made to other provisions dealing generally with enlistment contracts. *See, e.g.*, DAPC-PAS-0714002 Feb. 75, SUBJ: Interim Change to AR 635-200 Paragraphs 5-32 and 5-12. For comments on current procedures for disposition of fraudulent enlistments see notes 116-119 *supra*.

²³⁰ The four recognized criteria for finding a constructive enlistment would be applied. *See* note 222 *supra*.

ture of recruiter misconduct, if any; (iii) the length and character of creditable service; and, (iv) the servicemember's potential contribution to the service.

- (3) The board's conclusions and recommendations should be forwarded to MILPERCEN, Wash. D.C. for action.

A centralized collection point for enlistment problems lends considerably to uniformity.

C. AMENDMENT OF ARMY REGULATION 601-210, RECRUITING PROCEDURES

A particularly bothersome area of enlistments is found in the potential abuse in declaring eligibility requirements to be for the primary benefit of the servicemember. The problem could be eliminated by amending the appropriate tables to reflect that the requirements are for the benefit of (1) the Government, (2) the recruit, or (3) both the Government and the recruit. Such an amendment could be included in a "policy" paragraph or as an amendment to each eligibility requirement or to a series of eligibility requirements. So designating the eligibility criteria would greatly reduce the leeway now enjoyed by the courts in interpreting the eligibility criteria.²³¹ At the same time the Government would continue to exercise paramount control over eligibility requirements.

VIII. CONCLUSION

*If a man will begin with certainties, he shall end in doubts; but if he will be content to begin with doubts, he shall end in certainties.*²³²

In *United States v. Blakeney* the Virginia Supreme Court addressed the ability of a minor to enter into an enlistment contract and bear arms:

If such ability in reference to [the statutory age requirement] was still to be a subject of judicial decision, instead of official discretion,

²³¹ See, e.g., *United States v. Little*, 24 C.M.A. 328, 52 C.M.R. 39 (1976); *United States v. Russo*, 23 C.M.A. 511, 50 C.M.R. 650 (1975). See generally notes 106-112 *supra*.

²³² F. BACON. *THE ADVANCEMENT OF LEARNING*, ch. 5 (1605).

then it must be determined not by the special circumstances of each particular case, but by a general rule of uniform application.²³³

The three-step uniform approach proposed in this article is a means of disposing of enlistment problems by a rule of general application. It is an attempt to resolve some of the uncertainties and inequities that exist in the law of enlistments. In applying the uniform approach several principles must be considered:

- (a) The Government's power to raise and support armies is paramount. It decides who may serve and the conditions of military service.
- (b) The enlistment contract between an individual and the Government changes the individual's status from citizen to soldier and places enforceable obligations (as does any other contract) on both parties.
- (c) Although general principles of contract law should be applied in interpreting an enlistment contract, the contract is unique. The Government's paramount powers and the absence of complete mutuality are factors which render it unique. Thus, the element of "contract" and the element of military "status" must be considered together in determining the effect and validity of the enlistment contract.
- (d) Public policy should prevent the servicemember from avoiding court-martial jurisdiction by using an invalid enlistment contract as a shield.

Each of these four principles is a composite of numerous rules, opinions, policies, and decisions. In the aggregate, they represent the mainstream of judicial and administrative authority. They should be applied in resolving any enlistment problem.

The inconsistent judicial and administrative view toward the enlistment contract often arise from detailed attention to individual fact situations and from inattention to controlling principles of applicable law. This whole area of law is a collage of opinions with little rhyme or reason—no one statute controls, no one decision is dispositive.

The uniform approach is a blending of the foregoing principles. It recognizes the federal position that enlistment contracts create a contractual relationship between the soldier and the state. And it also recognizes the equally important emphasis by military au-

²³³ 44 Va. (3 Gratt.) 387 (1847). See also notes 18-26 and accompanying text *supra*.

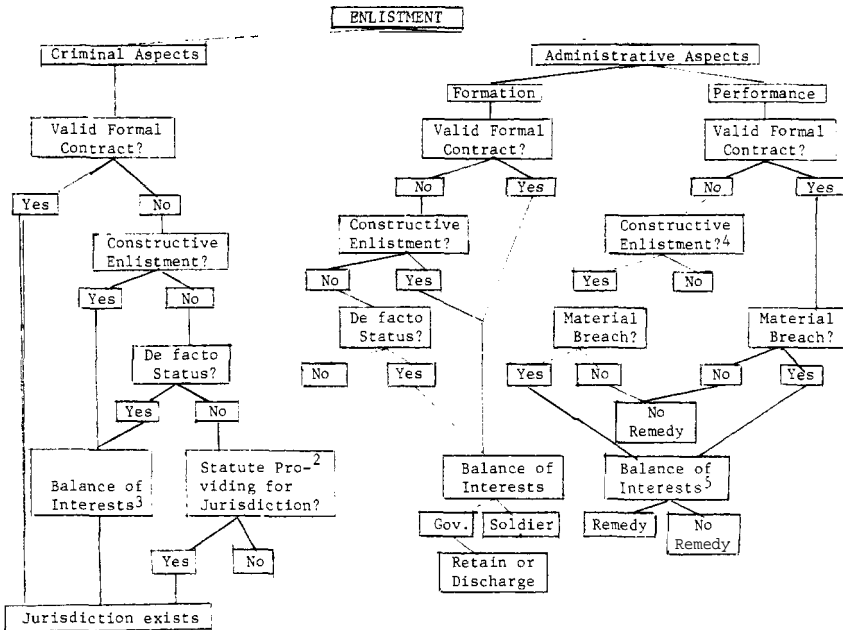
thorities on the creation of a unique status. As a hybrid approach, it draws from the best of many divergent perspectives. Thus, as a practical application which adopts a common definition, applies contract principles, and balances the interests, the uniform approach is both a plausible and desirable method for solving enlistment problems.

*What has once been settled by a precedent will not be unsettled overnight, for certainty and uniformity are gains not lightly to be sacrificed.*²³⁴

²³⁴ B. CARDOZO, THE PARADOXES OF LEGAL SCIENCE (1928).

APPENDIX A

ENLISTMENT PROBLEMS: DECISION FLOW CHART



NOTES :

1. A distinction can be made between "constructive enlistment" and "de facto status." See note 203 supra.
2. For proposed statute *see* section VI *supra*.
3. Where servicemember is pending charges, public policy should usually tip balance in favor of Government (jurisdiction exists).
4. Although formal valid contract *is* lacking, individual may have standing to argue material breach of contract on grounds of constructive enlistment (implied contract).
5. Even though material breach may have occurred, factors such as "supervening statute" and "national emergency" should be considered.